Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 3

Statement of the Case 4

A. The Facts 4

B. Proceedings in the Courts Below 4

Reasons for Granting the Writ 5

1. The Eighth Circuit has decided a federal question in a way that conflicts with the applicable decisions of the Court 5

2. The Eighth Circuit has decided an important federal question in a novel way that conflicts with a majority of the United States Circuit Courts of Appeals and should be reviewed by the Court 7

Conclusion 15

Affidavit of Service 16

Table of Authorities

Cases:

Barr v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972) 8, 10

PAGE

Certain Underwriters at Lloyd's v. *United States*, 511 F.2d 159 (5th Cir. 1975) 7, 10

Drake v. *Treadwell Construction Co.*, 299 F.2d 789 (3rd Cir. 1962) 6

Feres v. *United States*, 340 U.S. 135 (1950) .....*passim*

Galimi v. *Jetco, Inc.*, 514 F.2d 949 (2nd Cir. 1975) ..8, 12, 13
General Dynamics Corporation v. *United States*, 535 F.2d 489 (9th Cir. 1976) 8, 9

Murray v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968) 8, 10

Newport Air Park, Inc. v. *United States*, 419 F.2d 342 (1st Cir. 1969) 8, 12

Travelers Insurance Company v. *United States*, 493 F.2d 881 (3rd Cir. 1974) 8, 12
Treadwell Construction Co. v. *United States*, 372 U.S. 772 (1963) 6, 7, 9

United Air Lines v. *Wiener*, 335 F.2d 379 (9th Cir. 1964) *cert. denied*, 379 U.S. 951 (1964) 9
United States v. *Brown*, 348 U.S. 110 (1954) 7
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) .. 11

Wallenius Bremen G.m.b.H. v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970) 8, 12
Wellington Transportation Co. v. *United States*, 481 F.2d 108 (6th Cir. 1973) 8, 11
Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597 (1963) 5, 6, 7

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STENCEL AERO ENGINEERING CORPORATION,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stencel Aero Engineering Corporation, third-party plaintiff and appellant in the proceedings below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Opinions Below

The opinion of the Court of Appeals is not reported, either officially or unofficially. It is printed in the Appendix to this Petition at pages 4a-23a.

The opinion of the District Court is reported at 395 F.Supp. 52 (E.D.Mo. 1975) and is printed in the Appendix to this Petition at pages 24a to 27a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1976. Appendix, p. 4a. This petition is timely filed pursuant to 28 U.S.C. §§1254(1) and 2101(c).

Questions Presented

As alleged in his complaint, John C. Donham, while on duty for training with the Missouri Air National Guard was seriously injured when forced to eject from the F-100D fighter aircraft he was piloting. He brought suit against Stencel Aero Engineering Corporation ("Stencel"), the United States of America ("United States") and others in the District Court for the Eastern District of Missouri, alleging that the egress system which caused his injuries was defective. Stencel cross-claimed for indemnity against the United States alleging that the defect was the result of designs and specifications provided by the United States. Stencel claimed that it was entitled to indemnity under Missouri law, the accident having occurred in Missouri.

The United States moved for summary judgment against Donham asserting that *Feres* v. *United States*, 340 U.S. 135 (1950), barred Donham's action since he was an on-duty serviceman and the injuries were sustained "incident to his service." The United States also moved for summary judgment against Stencel claiming that its immunity from liability to Donham barred Stencel's claim for indemnity inasmuch as the United States had no underlying liability to Donham. Stencel claimed that under the Federal Tort Claims Act Missouri law governed Stencel's cross-claim against the United States and that Missouri law does not require underlying liability of the United States to Donham

in order for indemnity to lie in favor of Stencel against the United States for any damages awarded to Donham.

The District Court, Nangle, D.J., granted summary judgment in favor of the United States both as to the claim of Donham and the claim of Stencel. Stencel appealed and the United States Court of Appeals for the Eighth Circuit affirmed.

The Eighth Circuit held that it was inappropriate to apply state law to federal relationships involving the United States, its military contractors and its military employees. Therefore, the court concluded the Federal Tort Claims Act which required the application of state law in determining the liability of the United States does not apply to the facts of this case wherein indemnity is sought against the United States by a military contractor for damages suffered by an on-duty serviceman.

The question presented to the Court is:

> Whether, pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, state law should be applied to determine the validity of a cause of action for indemnity brought against the United States by a private individual who ultimately may be held liable for personal injuries suffered by a government employee caused by the negligence of the United States?

Statute Involved

The statute involved is the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, 2674. The text of these provisions is set forth in the Appendix to this Petition at pages 1a to 3a.

Statement of the Case

A. *The Facts.*

John C. Donham alleged in his complaint that on June 9, 1973 he was injured in Missouri when he was forced to eject from the F-100D fighter aircraft he was piloting. Donham further alleged that he was on duty for training with the Missouri Air National Guard.

Donham claimed that his injuries were the direct result of an "inherent defect" in the "egress life support system" installed on the aircraft. He claimed alternatively that the "egress life support system" malfunctioned because of the "negligence and carelessness of the defendants (Stencel and the United States) individually and jointly."

In its cross-claim, Stencel alleged that the defect was the result of faulty designs and specifications provided by the United States. Therefore, Stencel alleged that any liability it might have to Donham would be the result of the negligence of the United States in its relations with Stencel.

B. *The Proceedings in the Courts Below.*

The District Court held that, pursuant to *Feres* v. *United States,* 340 U.S. 135 (1950), the Court lacked subject matter jurisdiction to entertain either Donham's or Stencel's claims against the United States.

The decision and order of the District Court was appealed to the United States Court of Appeals for the Eighth Circuit. Stencel argued that *Feres* did not bar subject matter jurisdiction in the District Court; that a majority of the United States Courts of Appeals had applied state law pursuant to the command of the Federal Tort Claims Act in similar cases; that Missouri law allowed causes of

action for indemnity on the facts of this case; and finally, that the relationship of the United States to Donham was irrelevant to the determination of Stencel's cross-claim against the United States since it was founded on the negligence of the United States in its dealings with Stencel.

Disregarding any duties of the United States to Stencel, the United States argued that federal law should apply and preclude Stencel's recovery because to do otherwise would be to allow Donham to recover indirectly against the United States what he could not recover directly.

The United States Court of Appeals for the Eighth Circuit determined that the critical question was whether the Federal Tort Claims Act covered Stencel's cross-claim. In determining this question, the Eighth Circuit found in the *Feres* case a consideration of whether use of state law would be appropriate or inappropriate. The Court then held that, since two relationships in this case—the serviceman-government relationship and that between Stencel and the United States—were federal in nature, application of state law would be inappropriate. Since the Federal Tort Claims Act commands the use of state law, the Court of Appeals held that it does not apply to Stencel's cause of action. (Appendix page 13a.)

Reasons for Granting the Writ

1. *The Eighth Circuit has decided a federal question in a way that conflicts with the applicable decisions of the Court.*

In 1963, the Court, in *Weyerhauser S.S. Co.* v. *United States,* 372 U.S. 597, held that the Federal Employees Compensation Act's (hereinafter the FECA) exclusive liability provision did not bar recoveries against the United States by third persons held liable for injuries to government

employees. The precise issue in that case was whether the exclusive liability provision abrogated a one hundred year old divided damages rule in admiralty. The Court held that the divided damages rule would prevail, allowing the shipowner to recover from the United States half of the cost of a settlement paid to a government worker despite the exclusive liability provision of the FECA.

In *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), a case decided during the same term, the Court vacated and remanded a decision of the Third Circuit in light of *Weyerhaeuser. Treadwell* was a non-admiralty case in which a third party sought indemnity from the United States for damages suffered by a government employee. The clear intent of the decision in *Treadwell* was to extend the liability of the United States to the third-party for the damages of an injured United States employee. Since the decision of the Third Circuit, *Drake* v. *Treadwell Construction Co.,* 299 F.2d 789 (1962), was predicated on the inapplicability of the Federal Tort Claims Act (hereinafter the FTCA) by virtue of the exclusive remedy provisions of the FECA, the Court, in its remand, must have intended the application of state law pursuant to the FTCA.

The Eighth Circuit's opinion in this case appears to be in direct conflict with *Treadwell,* for in this case the Eighth Circuit has held that the FTCA and its application of state law does not govern a claim for indemnity by a third party for injuries to a government employee (in this case, a serviceman).

The fact that Donham is a serviceman rather than a government civil employee should make no difference. The Court's decision in *Feres* v. *United States,* 340 U.S. 135 (1950), stands for the proposition that a serviceman (or those claiming through him) may not recover in tort against the United States under the FTCA. Of the stated

rationales for the decision in *Feres,* the only rationale singled out by the Court as retaining its vitality in *United States* v. *Brown,* 348 U.S. 110 (1954) was the concern that a disruption of military discipline might result if servicemen were allowed to bring suit on the basis of negligent orders or acts committed in the course of military duty. This concern is not present when a third-party contractor is allowed to recover damages from the United States under the FTCA because of the negligence of the United States in breach of duties to that contractor occurring long before the serviceman was fortuitously injured.

There seems little doubt that Stencel's action would not be barred if it were for damages to a non-United States employee pilot. Since the concern about military discipline is not involved in this case, *Feres* is, in effect, the military counterpart to the exclusive liability provision of the FECA.

Thus, the opinion below conflicts with the Court's decisions in *Treadwell* and *Weyerhaeuser* that an absence of underlying liability of the United States to its employees does not bar a third party's action for indemnity against the United States under either the FTCA or the maritime divided damages rule.

2. *The Eighth Circuit has decided an important federal question in a novel way that conflicts with a majority of the United States Circuit Courts of Appeals and should be reviewed by the Court.*

Ten of the eleven circuits have decided cases involving actions for indemnity or contribution against the United States for damages to injured employees (military and civilian) in the last eight years. Of these, the Fifth,[1]

[1] *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975).

Tenth,[2] District of Columbia,[3] and, most recently, the Ninth[4] Circuits have looked to state law to determine whether the United States may be held liable to a third party in indemnity where the United States has no underlying liability to the injured employee. The Sixth Circuit[5] has expressed agreement with the interpretation of the Tenth Circuit, though it applied maritime law in allowing the claim of tort indemnity against the United States despite the fact that the damages were to an on-duty serviceman. The Fourth Circuit[6] has allowed indemnity against the United States, despite the exclusive liability provisions of the FECA, for injuries to a government employee.

The First,[7] Second,[8] and Third[9] Circuits have adopted a "federal rule" of tort contribution and indemnity in cases involving the FECA exclusive liability clause. The Eighth Circuit in this case appears to have adopted, by use of its appropriateness test, a similar rule where two or more federal relationships are involved.

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[2] *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972).

[3] *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

[4] *General Dynamics Corporation* v. *United States*, 535 F.2d 489 (9th Cir. 1976).

[5] *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (6th Cir. 1973).

[6] *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

[7] *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969).

[8] *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2nd Cir. 1975).

[9] *Travelers Insurance Company* v. *United States*, 493 F.2d 881 (3rd Cir. 1974).

A. The decision of the Eighth Circuit directly conflicts with the decisions of the Fifth, Ninth, Tenth, and D.C. Circuit Courts of Appeal.

The first Court of Appeals following *Treadwell* to deal with the issue was the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (1964), *cert. denied*, 379 U.S. 951 (1964). That case arose out of a mid-air collision between a commercial airliner and an Air Force jet and involved the deaths of nine government employees including two members of the Armed Forces. The Ninth Circuit sought to apply Nevada law on indemnity and contribution pursuant to the FTCA. However, since there was no Nevada law on point, the court canvassed the general common law throughout the United States and predicted for Nevada the adoption of the rule that there can be no indemnity in the absence of underlying liability of the would-be indemnitor to the injured party. Applying this rule to the government employee cases, the court held that the actions for indemnity could not be maintained against the United States.

This process was recently discussed in the recent Ninth Circuit case of *General Dynamics Corporation* v. *United States*, 535 F.2d 489 (1976), where the Ninth Circuit, footnote 4, noted that the *Wiener* court enunciated "the general principles governing the problem arising in Nevada in the absence of local decisions to the contrary." 535 F.2d at 490. In denying indemnity and reaffirming *Wiener*, the Ninth Circuit further noted: "We find nothing in the decisions of the courts of California where the present cases arose, at variance with these principles as approved in Wiener." 535 F.2d 489 at 490. *General Dynamics Corporation* v. *United States*, Docket No. 76-220, is presently before this Court on a Petition for a writ of certiorari.

In 1968, the District of Columbia Circuit considered the issue in *Murray* v. *United States,* 405 F.2d 1361 (D.C. Cir. 1968). In that case, owners of a building leased to the United States sought contribution and contractual indemnity from the United States for injuries to a government employee. The court adopted the local law of the District of Columbia pursuant to the FTCA. The local rule was that "there is no right of contribution . . . unless there is a joint liability of both parties to the injured party." 405 F.2d at 1364. The court concluded that the FECA removed the liability of the United States to the injured party and that, consequently, the action for contribution could not be maintained under District of Columbia law.

The Court of Appeals for the Tenth Circuit considered the issue in *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972). That case involved a government contractor who sought indemnity from the United States for injuries to a serviceman which Brezina, the government contractor, alleged was the result of defective designs prepared by the United States. The court affirmed the district court's application of Utah law noting that, while *Feres* bars a serviceman's direct remedy against the United States, ". . . . it does not follow that a defendant third party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations." 464 F.2d at 1143. Applying Utah law, the court found that Brezina could not sustain its burden of proof on the indemnity issue. This case is factually indistinguishable from the instant case.

In the more recent case of *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975), the Fifth Circuit decided a contribution case on the basis of

Louisiana law. The court held that Louisiana law required that Lloyd's and the United States be jointly liable to the injured serviceman. Since *Feres* served to eradicate the United States' liability to the serviceman, under Louisiana law, Lloyd's could not maintain its action for contribution.

In these four cases, the legal theory applied by the four Circuits is both logical and simple. The actions for indemnity and contribution are brought pursuant to the Federal Tort Claims Act. *United States* v. *Yellow Cab Co.,* 340 U.S. 543 (1951). Neither the FECA exclusive liability provision nor *Feres* bar such claims at the threshold. The courts then look to the applicable state law to determine whether, under like circumstances, contribution or indemnity would lie against a private person. If, but only if, the state law (as found or predicted) requires underlying liability of the United States to the injured party as a prerequisite to indemnity or contribution, do the courts then look to FECA or *Feres* to determine that there is not underlying liability of the United States to its injured employees. Where state law does not require underlying liability, the claim for indemnity or contribution must lie against the United States.

Thus, all four cases stand in stark conflict to the Eighth Circuit's choice of a federal "appropriateness" test to determine applicability of the FTCA to claims for indemnity against the United States.

B. The decision of the Eighth Circuit is in conflict with analogous decisions of the Fourth and Sixth Circuits.

The decision of the Eighth Circuit is in conflict with the decisions of the Sixth and Fourth Circuits. In an analogous situation, the Sixth Circuit in *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), held

that "the *Feres* decision does not bar third party indemnity claims against the United States arising out of suits by injured servicemen." 481 F.2d at 111. Rejecting a federal common law of tort indemnity the court, instead, looked to maritime law to determine whether the alleged claim for indemnity should be upheld.

The Fourth Circuit, in *Wallenius Bremen G.m.b.H.* v. *United States,* 409 F.2d 994 (4th Cir. 1969) held that the exclusive remedy provisions of the FECA did not bar an action for indemnity against the United States under the FTCA and the Suits in Admiralty Act. In allowing the action for indemnity, the Court adopted a liberal admiralty rule which does not require joint underlying liability for actions in indemnity.

C. The decision of the Eighth Circuit is similar to the decisions of the First, Second, and Third Circuits.

Several Circuits have reached results similar to that of the Eighth Circuit. In *Newport Air Park, Inc.* v. *United States,* 419 F.2d 342 (1st Cir. 1969), *Travelers Insurance Company* v. *United States,* 493 F.2d 881 (3rd Cir. 1974), and *Galimi* v. *Jetco, Inc.,* 514 F.2d 949 (2d Cir. 1975), the courts held as a matter of federal law that the FECA exclusive liability provisions barred suits against the United States for contribution for damages payable to injured government employees.

The rationale of these cases seems to be that the FECA is a federal workmen's compensation statute. As such, these courts have held that a federal rule should be evolved barring a claim for contribution by a third party against the United States where the government has paid benefits to its injured employee. As the Second Circuit stated in *Galimi*:

> A plurality of the Courts of Appeals has concluded that a third-party claim for contribution or tort indemnity against the United States does not lie, either because of the language of the exclusive remedy provision or because of the extinguishment of the government's underlying tort liability to its employees. 514 F.2d 949 at 953.

D. The Court should review the question presented both because of its importance and the serious ramifications inherent in the novel approach taken by the Eighth Circuit.

The issue presented for decision by this Petition is one of considerable importance. The United States Courts of Appeals have been unable to resolve the question uniformly despite numerous attempts. The issue is an ultimate one involving questions of federal immunity from suit and statutory construction. The court below termed it "an important issue under the Federal Tort Claims Act." Appendix, page 5a. As the court below further stated:

> No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman. Appendix, p. 21a.

The Second Circuit in *Galimi* stated:

> The issue raised by the alleged conflict between the statutory exclusive remedy provisions embodied in most workmen's compensation laws and the doctrines governing third-party suits for contribution or indemnification in personal injury actions is neither new nor limited to the federal sphere . . . It presents what

one author has called "[p]erhaps the most evenly balanced controversy in all of workmen's compensation law." 514 F.2d at 952.

The approach taken by the court below in resolving the dilemma is the most sweeping in its ramifications. The Eighth Circuit has adopted a new test for determining the applicability of the Federal Tort Claims Act which petitioner believes to be both difficult of application and replete with detrimental ramifications.

The appropriateness test as to when state law should apply in the presence of federal relationships enunciated by the Eighth Circuit is inherently difficult to apply. In contrast, the Federal Tort Claims Act is clear and absolute in its command that state law should apply. This is the choice made by Congress.

Petitioner suggests that such a drastic departure from the command of the Federal Tort Claims Act that state law is to apply should be reviewed by the Court. Such a review is particularly necessary at this time to insure a uniform application of federal statutes, since the Circuits, as above described, are in serious conflict.

Conclusion

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, as prayed for herein.

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Dated: New York, New York
September 1, 1976

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Nathaniel F. Knappen

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 1st day of September, 1976, served three copies of the foregoing Petition for a Writ of Certiorari upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Michael J. Holland
Michael J. Holland

Sworn to before me this
1st day of September, 1976

/s/ Lawrence Mentz
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

APPENDIX

Statutes

28 USC § 1346. UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimd to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176.

28 USC § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and cor-

porations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982; May 24, 1949, c. 139, § 124, 63 Stat. 106.

28 USC § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1516

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,
STENCEL AERO ENGINEERING CORP., and
MILLS MANUFACTURING CORP.,

Defendants.

STENCEL AERO ENGINEERING CORP.,

Cross-Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Cross-Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: February 11, 1976.

Filed: June 4, 1976.

Opinion of Court of Appeals

Before

GIBSON, *Chief Judge;* BRIGHT, *Circuit Judge;*
and VAN PELT, *Senior District Judge.**

BRIGHT, *Circuit Judge.*

This appeal presents an important issue under the Federal Tort Claims Act (FTCA) whether the United States which is immune to liability for its negligent conduct producing injury and damages to an on-duty serviceman may, nevertheless, be obligated indirectly to pay the amount of such damages through a claim for tort indemnity asserted by a third party who becomes liable for tort damages to that serviceman. We answer that issue in the negative.

Captain John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, while flying over Eastern Missouri, ejected from his military aircraft under emergency conditions. As a result of the malfunctioning of his aircraft's "egress life support system," he claims to have sustained serious and permanent injuries. This incident gives rise to the present appeal. Stencel Aero Engineering Corporation (Stencel) manufactured this sytem [sic]. Donham brought an action to recover for his bodily injuries, and he named as defendants, Stencel, the United States, and Mills Manufacturing Corporation. Stencel answered the complaint denying any liability and instituted a cross-claim against the United States for total indemnity.

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* ROBERT VAN PELT, Senior District Judge, District of Nebraska, sitting by designation.

The United States moved for judgment on the pleadings against both Captain Donham and Stencel. In response to this motion, the district court dismissed Captain Donham's action against the United States on grounds of sovereign immunity, relying upon *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demco,* 385 U.S. 149 (1966). Relying on these same cases, the district court also dismissed Stencel's cross-claim for indemnity. The court certified its disposition of Stencel's cross-claim as a final appealable judgment under Rule 54(b), Fed. R. Civ. P., and Stencel now appeals that judgment.[1]

Although the doctrine of *Feres* v. *United States, supra,* precludes Captain Donham from proceeding directly against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674, that doctrine, according to Stencel's contention, does not preclude Stencel as a non-military third party from obtaining restitution by way of indemnity against the United States for any damages which it might be compelled to pay to Donham. Stencel alleges that it manufactured and constructed the ejection system according to specifications and requirements provided by the United States and, in part, using components supplied by the United States.[2] After manufacture, Stencel

[1] Neither the plaintiff, Captain Donham, nor a third defendant, Mills Manufacturing Corporation, is a party to this appeal. We are concerned here only with the rights, if any, of Stencel to seek indemnity against the United States for the claim made against it by the serviceman. Since judgment was granted prior to any discovery, we are concerned only with the facts as pleaded.

[2] The Government's brief cites several cases which suggest that these allegations, if true, may constitute a defense by Stencel to Captain Donham's complaint. *See, e.g., Littlehale* v. *E.I. du Pont de Nemours & Co.,* 268 F. Supp. 791, 804 (S.D.N.Y. 1966), *aff'd,* 380 F.2d 274 (2d Cir. 1967); *Myers* v. *United States,* 323 F.2d 580 (9th Cir. 1963); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.,* 295 F.2d 14, 16 (9th Cir. 1961). This question is not before us.

alleges that the United States took custody and control of the egress system and assumed responsibility to repair and maintain the system and to warn and instruct government employees in its proper use.

Stencel alleges that these facts imposed an independent duty upon the United States to assure Stencel that the system was not defective or inherently dangerous. Stencel argues that should it suffer any liability because of the Government's breach of its duty, it should recover indemnification in full. Further, Stencel alleges that if Donham's injuries resulted from negligence, the Government's conduct constituted active negligence but Stencel's improper conduct, if any, constituted passive negligence. Stencel argues that such a disparity of fault gives rise to a right of indemnity in favor of Stencel. Stencel asserts, appropriately, that judgment on the pleadings for a dismissal can be sustained only if it is clear beyond doubt that Stencel could prove no set of facts in support of its indemnity claims, entitling it to relief. *See Conley* v.*Gibson,* 355 U.S. 41, 45-46 (1957); *Bramlet* v. *Wilson,* 495 F.2d 714, 716 (8th Cir. 1974).

Stencel relies upon the Supreme Court's statement that through the FTCA the United States has waived its immunity from tort suits in "sweeping language." *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 547 (1951).[3] Generally, the United States subjects itself to suit under the FTCA to the same extent as a private individual under

[3] 28 U.S.C. §2674 (Federal Tort Claims Act), in part provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The jurisdictional counterpart of this provision is contained in 28 U.S.C. §1346(b).

similar circumstances in accordance with the law of the state where the tort occurred. Stencel cites several Missouri cases for the proposition that indemnity relief would be available to it under state law. *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City Southern Ry. Co.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v. *Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967). While the United States denies that Missouri law authorizes indemnity under similar circumstances, it asserts as its principal defense that federal law applies and that a claim for damages sustained by a serviceman on active duty, whether asserted directly by that serviceman or indirectly by a third party by way of indemnity, is barred by application of the doctrine of the *Feres* case.

I. *The Scope of the Federal Government's Waiver of Sovereign Immunity Is a Question of Federal Law.*

The Federal Tort Claims Act substantially changed prior law. First, it waived the Government's sovereign immunity to most tort actions and provided for suits against the United States in the federal district courts. Second, it adopted the substantive law of the state in which the tort occurred as the standard of conduct to assess the Government's liability. Since, as we have previously observed, the scope of the waiver of sovereign immunity is quite broad, federal courts have usually focused upon interpretation and application of state law in resolving claims for indemnity.[4]

[4] *See, e.g., Adams* v. *General Dynamics Corp.*, No. 74-3484 (9th Cir., Apr. 15, 1976) (California law); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975) (Louisiana law); *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1969) (Arkansas law); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (Nevada law).

However, the extent of the waiver remains an important consideration. Without a waiver of sovereign immunity applying to the claim asserted, the claim against the Government must fall. Where a question arises as to the extent of the waiver of sovereign immunity under the FTCA, the issue "is a question of federal law, separate and prior to the question of • • • liability under state law." *See Galimi* v. *Jetco., Inc.*, 514 F.2d 949, 952 (2d Cir. 1975); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 883 (3d Cir. 1974).

II. *The United States Has Not Consented Under the Federal Tort Claims Act to be Sued for Indemnity by a Government Contractor Who is Liable to a Serviceman for Injuries Occurring on Active Duty.*

Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b). That the Act incorporates such state standards is a matter "not without significance" in determining "whether the Act should be construed to apply • • •." *Feres* v. *United States, supra*, 340 U.S. at 142. Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state law apply to situations arising out of these two relationships.

Each of these relationships long has been held to be governed exclusively by federal law. In *Feres*, the Su-

preme Court reaffirmed the long-recognized rule that the "relationship between the Government and members of its armed forces is 'distinctively federal in character • • • '." 340 U.S. at 143, *quoting United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). In *Standard Oil*, the court emphasized that

> [t]o whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. [*Id.* at 305-06.]

Likewise, it is firmly established that the rights and duties of the United States arising pursuant to its contractual obligations primarily are governed by federal common law. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *see Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). *Cf. Whelan* v. *Penn Central Co.*, 503 F.2d 886 (2d Cir. 1974).

Thus, both essential aspects of the current case have long been committed to federal law. To conclude that the general language of the FTCA makes applicable the vagaries of state law would surely be, in the language of *Feres*, to "visit the Government with novel and unprecedented liabilities." 340 U.S. at 142. Again, in the language of *Feres*, "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

The rationale of the Court in *Feres* is, we believe, applicable to Stencel's indemnity claims. This bolsters our

conclusion that Congress did not intend to permit this type of indemnity claim under the FTCA.

In *Feres*, the Court first observed that the FTCA was not intended to create new and unusual causes of action but was simply intended to permit the application of *appropriate* state law. *Id.* at 142. The Court then noted that the Government's authority over a member of the Armed Services is without parallel among private parties.[5] In particular, the Government's right to assign a serviceman to active duty in any single state or to several states makes it unreasonable that rights and obligations between the active duty soldier and his government should turn on accidents of political geography. *Id.* at 143. These same considerations militate strongly against Stencel's indemnity claims as well. Precisely because of the Government's unique interests and powers, its contractual obligations with material suppliers are controlled by federal law. The policies behind this rule become particularly compelling when the Government is purchasing military equipment. The Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties. The mobility of the Armed Forces is due, in large part, to military equipment such as Captain

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[5] In commenting upon *Feres*, in a 1954 case, the Court noted the special nature of the military relationship:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. [*United States* v. *Brown*, 348 U.S. 110, 112 (1954).]

See Alexander v *United States*, 500 F.2d 1 (8th Cir. 1974).

Donham's aircraft, which can move rapidly across this country as well as overseas.

It makes little sense to say that the duty of the United States to indemnify Stencel, a North Carolina corporation, should turn upon the fortuity that an aircraft which incorporated a Stencel product happened to crash in Missouri. Thus, since Stencel's relationship to the United States lies in a military context and the claim arises out of injuries to a serviceman, the underlying rationale of the *Feres* case suggests that provisions of the FTCA should not be read to extend to such relationships. Moreover, we think it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of Stencel to force the United States to indirectly pay those damages.

In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.[6] This result, though not necessarily the rationale, receives support from other decided cases.

Five courts of appeals have faced the question of a claim against the United States under the FTCA for indemnity of claims arising from injury in a military context. All

[6] Stencel has been careful to confine its contract-related claim to the assertion of a duty "*implied in law* out of the relationship between Stencel and the United States * * *." However, Stencel has cited some authority for the proposition that, in at least some government contracts which set detailed standards of performance, an agreement to indemnify is *implied in fact*. *See, e.g., J.D. Hedin Const. Co., Inc.* v. *United States*, 347 F.2d 235, 241 (Ct. Cl. 1965). Such alleged right, if cognizable as a contract right, might be asserted in the Court of Claims under the Tucker Act, 28 U.S.C. §1346(b)(2). *See Murray* v. *United States*, 405 F.2d 1361, 1366 (D.C. Cir. 1968); *cf. Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 999 (3d Cir. 1974).

but one of these courts have denied indemnity and contribution.[7] However, the circuits have not adopted a consistent rationale and the language of the various opinions cannot be harmonized. Although several of these opinions have said that the *Feres* holding is not a *per se* bar to third party indemnity claims, none has considered whether the considerations underlying *Feres* require a limitation of the right under the FTCA to seek indemnity against the United States for damages paid to compensate for a serviceman's injury.

The most recent decision of which we are aware is *Adams* v. *General Dynamics Corp.*, —— F.2d ——, No. 74-3484 (9th Cir., Apr. 15, 1976). In *Adams*, the Ninth Circuit reaffirmed its prior holdings denying indemnity in *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967), and *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom., United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (1964). In each of these cases the claims arose out of a collision between a military and a private aircraft resulting from the fault of both pilots. In *Wiener*, the negligence of the military pilot was primarily responsible for the collision. The court permitted United Air Lines to recover full indemnity against the Government for the damages paid all civilian passengers of the private aircraft. However, the court denied any restitution to

[7] A number of federal courts have discussed a somewhat analogous issue raised by the exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. §8116(c)) and with varying rationales have either denied or allowed third party recovery for contribution or indemnity from the United States. *See Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); Annot., 12 A.L.R. Fed. 616 (1972).

United Air Lines for damage awards to the civilian and military federal employees injured while flying in the military aircraft.

With respect to the civilian federal employees, the court held that neither "contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor [the United States] to the person injured [the civilian government employees]." *Id.* at 403. The court held that the exclusive liability provision of the Federal Employees' Compensation Act precluded finding the necessary tort liability of the Government to the civilian employees. The court then considered the servicemen cases and ruled that

> [w]ith respect to the two servicemen cases, United's claim for indemnity must fall for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service. Feres v. United States, 340 U.S. 135 • • •. [*Id.* at 404.]

The other two Ninth Circuit cases involve similar facts and reach the same result. All of these decisions rested solely upon tort liabilities; no implied contractual or quasicontractual rights—attenuated or otherwise—were advanced or decided. *Cf. Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

In *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1967), a Navy vehicle collided with a private auto as the result of mutual fault. A serviceman passenger in the Navy vehicle recovered against the private driver. The private driver, in turn, sought to shift part or all of the burden to the United

States because of the negligence of the Navy driver. The court construed the claim as one for contribution and denied recovery on the merits. Although the case was technically decided under state law, the Ninth Circuit's decisions in *Wein* and *Wiener, supra,* were cited[8] for the proposition that such recovery could not be had in the absence of direct liability of the United States to the injured party. Again, no contractual relationship existed between the party seeking indemnity and the United States.

The Tenth Circuit considered a similar issue in *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). There, two contractors had remodeled a building at Hill Air Force Base pursuant to faulty government specifications. A serviceman sustained injuries because of the faulty construction and brought suit against the contractors. The contractors settled the claim for $45,000, then sought indemnity from the United States. The district court dismissed the complaint, holding that *Feres* barred any indemnity and, alternatively, that the contractors were guilty of active negligence in knowingly constructing the building in compliance with patently defective specifications. The Government's negligence in providing the specifications was termed passive.

The Tenth Circuit ruled that the *Feres* doctrine *per se* did not preclude the action for indemnity, and stated in addition that under the Supreme Court's holdings in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., supra; Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.,*

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[8] 382 F.2d at 124. Because of these citations, *Maddux* has been read as applying to indemnity as well as contribution. *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

355 U.S. 563 (1958); and *Treadwell Construction Co.* v. *United States, supra,* "a party seeking indemnity is not barred at the threshold." 464 F.2d at 1144. However, the court went on to affirm the dismissal of the indemnity claim on the grounds that the contractor's active negligence precluded ordinary tort indemnity and that no implied warranty could be found to support a quasicontractual claim.

The court specifically declined to extend the Supreme Court's admiralty-related cases to cover the situation. The court said:

> [W]e are constrained to hold that neither the *Ryan* nor *Weyerhaeuser* nor any of the other *Ryan* progeny governs. These cases all arise in the admiralty area, and most courts have refused to apply liberally the concept of implied warranty or implied contract to indemnify in other fields. [464 F.2d at 1145 (footnote omitted).]

Appellant-Stencel emphasizes the following language from *Barr*:

> [I]t does not follow [from *Feres*] that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations. [*Id.* at 1143.]

This statement is correct as far as it goes. However, it does not proceed to an analysis of those "different considerations" in light of the *Feres* rationale. In *Barr,* the contractor's own active negligence offered a simple basis for affirming the dismissal. Here, because of the sparse

record, we have been compelled to squarely confront the reach of the FTCA in circumstances of this case in light of the underlying rationale of *Feres.*[9]

The Fifth Circuit considered the indemnity issue as related to an injured serviceman in *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975). There a military serviceman sustained injuries at the hands of a surgeon and nurses of the United States Public Health Service. The district court had dismissed his suit against the surgeon and nurses as not sanctioned by the FTCA read in light of *Feres.* This ruling was not appealed by the serviceman. However, the serviceman also had brought a direct action against the malpractice insurer of the operating surgeon as permitted by Louisiana law. Lloyd's, the insurer, settled the case for $75,000, and sought contribution from the Government on the theory that the United States Public Health Service nurses assisted in the allegedly negligent treatment. Lloyd's contended that according to the Louisiana Civil Code, this made the nurses,

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[9] It is interesting that the Ninth Circuit panel which decided *Adams* v. *General Dynamics Corp., supra,* included both the trial judge in *Barr* and a member of the appellate panel in that case. The *Adams* panel notes that the broad language of *Barr* is somewhat inconsistent with other Tenth Circuit precedent and suggests that the decision should be considered to rest upon the active negligence of the contractors and the passive negligence of the Government. Slip op. at 5 n.6.

That panel observed that the ambiguous holding and peculiar history of *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963) (*per curiam*), is of " 'little manifest significance,' " and that the Supreme Court has, in fact, " 'left the issue [of third party indemnity in nonadmiralty cases] squarely undecided.' " Slip op. at 5 n.6, *quoting* Note, *Federal Law—Contribution and Indemnity Under the Federal Employees Compensation Act,* 6 Toledo L.Rev. 272, 282 n.42 (1974). The *Treadwell* decision seems of limited significance in cases arising out of injuries to a member of the Armed Forces on active duty.

and hence the United States, liable to Lloyd's as debtors "in solido." [10]

The court determined that under Louisiana law no right to contribution existed because the United States could not be held liable to the serviceman in his own right and hence, could not be considered liable "in solido" with Lloyd's. The court considered its conclusion to be consistent with that reached by this circuit in *Maddux* v. *Cox, supra,* 511 F.2d at 163. It noted that the insurer had relied on the opinions in *Barr* v. *Brezina Construction Co., supra,* and *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), discussed *infra.* Although these decisions did not compel a determination favorable to the insurer, the court stated:

> We are in agreement with the expression in those opinions that *Feres* itself does not bar a third party suit against the United States for indemnity. [511 F.2d at 163.]

As in *Barr* v. *Brezina Construction Co., supra,* the court did not discuss whether the underlying rationale of *Feres* might preclude indemnity.

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[10] LSA-Civil Code Article 2103 provides:

> When two or more debtors are liable in solido . . . [the obligation] should be divided between them. As between the solidarity debtors, each is liable only for his virile portion of the obligation. [*Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159, 161 (1975).]

The meaning of the term "in solido," as used in the above statute, is found in Article 2091 of the Civil Code:

> There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor. [511 F.2d at 161.]

In *Wellington Transportation Co.* v. *United States, supra,* the Sixth Circuit held that a third party in a posture similar to that of Stencel may obtain indemnity. *Wellington* arose under admiralty law when a Coast Guard cutter and an automobile ferry, operated by Wellington Transportation Company, collided. A member of the Coast Guard in active service was injured and brought an action against Wellington to recover for his injuries. He failed in his claim but Wellington incurred substantial expense in defending the action. Wellington thereafter brought an action against the United States for indemnity to obtain reimbursement of the attorney's fees and expenses incurred in successfully defending against the principal action.

The court rejected a contractual indemnity theory such as was recognized by the Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp., supra.* As an alternative, Wellington claimed entitlement to reimbursement under the theory of tort indemnity. The district court had denied the claim relying on *Feres.* The Sixth Circuit disagreed, reading *Feres* as "concerned only with an injured serviceman's direct remedy against the United States" and finding that "nothing in the Court's opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States." 418 F.2d at 111. The court then determined that the right to tort indemnity was properly allowable under federal maritime law. However, the court remanded for further proceedings since the record did not establish that appellant's attorney's fees had been incurred in defense of a liability based upon appellant's "passive," "constructive," "vicarious," or "insulated" fault, for which the Coast Guard was the "primary" or "active" wrongdoer. *Id.* at 112.

Obviously, *Wellington* offers support for Stencel's claim. However, its rationale conflicts with the other cases we have already discussed. The basis for potential recovery rested on simple "tort indemnity," devoid of any implied contractual or quasicontractual overtones. As our prior discussion indicates, this form of indemnity requires some form of tort liability to the injured person by the party sought to be charged as an indemnitor, and several cases, as previously discussed, hold that *Feres* precludes any such tort liability on the part of the Government. *Wellington* does not mention this circuit's decision in *Maddux* v. *Cox, supra,* the two Ninth Circuit cases cited therein, or the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's* v. *United States, supra.* Although these four cases technically may have turned upon particular state law, in fact they looked to and construed the general common law followed by most states and which law also would usually apply in an admiralty setting. *Cf. Hess* v. *United States,* 361 U.S. 214 (1960). *Wellington* cannot be regarded as turning upon a contrary special rule. Thus, the rationale of the court is inconsistent with the cases we have previously discussed.

Nor does *Wellington* offer much guidance on the availability of a third-party military-related indemnity claim. The court states that the *Feres* holding is not a *per se* bar to such relief. However, it does not further discuss the issue. Perhaps the best explanation of *Wellington* is that the tort occurred on a navigable waterway under admiralty law and that the primary claim for indemnity was based upon a quasicontractual duty to indemnify which is liberally inferred in admiralty law. Such claims have been allowed by the Supreme Court in admiralty cases such as *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., Inc., supra,*

and its progeny, and the Supreme Court's ambiguous disposition of *Treadwell Construction Co.* v. *United States, supra, see* note 9, *supra,* was taken by the *Wellington* court to require adherence to the *Ryan* rule. Certainly this view is supported language of the *Wellington* decision. [sic]

In any event, *Wellington* offers us no persuasive analysis of the relationship of the *Feres* rationale to the scope of the Government's waiver of immunity under the FTCA. Unfortunately, this is equally true of the other circuit court opinions we have discussed, including our own in *Maddux* v. *Cox, supra.* No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman.

While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant case. We cannot agree with Stencel that the general language of the FTCA was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concommitant obligations and liabilities imposed by the states upon private citizens. The involvement of the military relationship in this case distinguishes this case from those involving workmen's compensation acts such as the Longshoreman's Act considered in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.,* 315 U.S. 124 (1956), and its progeny, and the Federal Employees' Compensation

Act considered in *Weyerhaeuser, supra,*[11] and in *Wallenius Bremen* v. *United States,* 409 F.2d 994 (4th Cir. 1969).

To allow Stencel to recover in this case would require us to "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States, supra,* 340 U.S. at 142. The FTCA neither permits nor compels us to effect such a "radical departure" from the established rule of law that federal military and contractual relationships are not to

[11] In *Weyerhaeuser S.S. Co.* v. *United States, supra,* the federal civilian employee's injuries occurred as the result of a collision between a private vessel and an Army dredge. Both vessels were at fault. The federal employee recovered against the private vessel which then successfully sought partial indemnity from the United States. The Court's reasoning in granting 50 percent indemnity is inapposite to the circumstances of the present case for the following reasons:

1) There is no good reason in normal circumstances for excusing a military vessel from obeying nationwide (and, to a large extent, worldwide) uniform maritime "rules of the road" when operating in navigable waters.

2) The action appeared to be directly authorized by the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.*, which " 'was intended to impose on the United States the same liability • • • as is imposed by admiralty law on the private shipowner • • •.' " 372 U.S. at 600.

3) The Government's liability for half the damages was based upon "a rule of admiralty law which, for more than 100 years, has governed with • • • clarity the correlative rights and duties of two shipowners whose vessels [were] both at fault." *Id.* at 603. This rule was well known to Congress when the Public Vessels Act was adopted.

4) The Federal Employees' Compensation Act expressly provided for recapture by the United States of FECA benefits paid to the employee, thus avoiding any possibility of a double recovery. *Id.* at 598 n.2.

We note that the Supreme Court has now modified admiralty's rigid equal division of damages rule, continuing the strong current trend toward apportionment of damages according to the relative fault of the parties. *See United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 406-07 (1975). However, this does not affect our analysis of the indemnity aspect of *Weyerhaeuser.*

be governed by state law.[12] Therefore, the order of the district court dismissing Stencel's cross-claim is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[12] Stencel emphasizes the unfairness of requiring it to risk bearing the entire burden of liability for injuries for which it may have been partially, secondarily, or passively responsible. It observes that indemnity and contribution are equitable remedies evolved by the courts to ameliorate this injustice, either by distributing the loss equally through contribution or by shifting the entire burden onto the party primarily responsible through indemnity. *See* Prosser, *Law of Torts,* 3d Ed. §278. There is some force to this argument.

In *Feres,* the Supreme Court reasoned that the simple, certain, and uniform system of military compensation to injured servicemen was intended to stand in lieu of governmental tort liability in cases where the Government might be considered at fault. We note that the District of Columbia Circuit has adopted a novel approach in response to a similar "unfairness" argument in an action for contribution. That court held that the position of a beneficiary of such a compensation scheme is analogous to that of a plaintiff who has allowed one joint tortfeasor to have "bought his peace," and that the remaining defendant is entitled to have the damages reduced by half. *Murray* v. *United States,* 405 F.2d 1361, 1365 (D.C. Cir. 1968); *Martello* v. *Hawley,* 300 F.2d 721 (D.C. Cir. 1962); *see Dawson* v. *Contractors Corp.,* 467 F.2d 727 (D.C. Cir. 1972); *cf. United States* v. *Brown,* 348 U.S. 110, 111 n.1 (1954).

Opinion of District Court

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

No. 74-711C(4).

United States District Court,

E. D. Missouri, E. D.

May 15, 1975.

Air national guard pilot brought diversity action under Federal Tort Claims Act against the United States and two private corporations for injuries sustained when he was forced to eject from his jet aircraft in flight while on duty. One corporation filed cross claim against the United States for indemnity. On the United States' motion for summary judgment, the District Court, Nangle, J., held that the claims were barred by sovereign immunity.

Motion sustained.

Action by air national guard pilot against United States under Federal Tort Claims Act, alleging that defect in aircraft egress life support system caused injuries sustained when he was forced to eject from jet aircraft in flight while on duty, was barred by sovereign immunity, and cross claim against United States by manufacturer of life support system, who was also party-defendant, was likewise barred by sovereign immunity, 10 U.S.C.A. §§ 8062, 8077, 8499; 32 U.S.C.A. §§ 104, 106, 110, 502.

Opinion of District Court

Correnti & Mykins, Robert E. Buechler, St. Louis, Mo., for plaintiff.

William A. Richter and Arthur L. Smith, Peper Martin, Jensen, Maichel & Hetlage, St. Louis, Mo. and Condon & Forsyth, New York City, for Stencel Aero Engineering Corp.

George M. Fleming and Paul F. Figley, Torts Section, Civil Division, U. S. Dept. of Justice, Washington, D. C., for United States.

MEMORANDUM

NANGLE, District Judge.

This action is before the Court upon the motions of the defendant United States for summary judgment against the plaintiff John C. Donham and to dismiss the cross-claim of co-defendant Stencel Aero Engineering Corporation ("Stencel").

Plaintiff seeks substantial damages against the United States and two private corporations for injuries sustained when, as a Missouri Air National Guard pilot, he was forced to eject from his jet aircraft in flight over Missouri. He alleges that a defect in the egress life support system, precipitated by defendants' negligence, caused his injuries. The action is brought pursuant to the Federal Tort Claims Act ("Act"), 28 U.S.C. §§ 2671-2680; diversity of citizenship is alleged to exist.

The United States moves for summary judgment on the ground that plaintiff's injury was incurred incident to his military service and that recovery against the United States under the Act is precluded by the teachings of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and United States v. Demko, 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966). The Supreme Court in *Feres*

ruled that the United States is not liable under the Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U.S. at 146, 71 S.Ct. at 159. In *Demko* the Court ruled that a federal prisoner, injured in the performance of an assigned prison task, was limited to his exclusive statutory remedy of compensation under 18 U.S.C. § 4126. He was precluded from suit under the Federal Tort Claims Act. *Feres* and *Demko* are sought to be applied alternatively by the United States.

The Court is of the opinion that plaintiff's status as a Missouri Air National Guard pilot is sufficiently related to federal military service to apply the *Feres* ruling to bar his claim against the United States. 10 U.S.C. §§ 8062, 8077 and 8499; 32 U.S.C. §§ 104, 106, 110, 502; 37 U.S.C. § 301. *See also* Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. den., 368 U.S. 990, 82 S.Ct. 605, 7 L.Ed.2d 527 (1961). Since the *Feres* ruling is founded on the doctrine of sovereign immunity, the Court will dismiss plaintiff's claim against the United States for lack of subject matter jurisdiction.

Stencel seeks indemnification against the United States by cross-claim alleging that Stencel manufactured the life egress system according to government specifications, that after manufacture the system was in the custody of and maintained by the United States, and that if at all Stencel's alleged negligence is passive and that of the United States is active. The United States argues that, to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly.

The Court agrees with the United States. In Terminal R. Ass'n. of St. Louis v. United States, 182 F.2d 149 (8th

Cir. 1950), cert. den., 340 U.S. 825, 71 S.Ct. 60, 95 L.Ed. 606 (1950), the Court of Appeals ordered dismissed for lack of subject matter jurisdiction a claim for indemnity against the United States. In that case the injured plaintiff's claim against the United States under the Federal Tort Claims act was dismissed as barred by sovereign immunity. The plaintiff's claim arose prior to the effective date of the Act. The immunity of the United States to plaintiff's claim rendered the claim for indemnity an "ethical" one only. That case governs Stencel's claim for indemnity against the United States. It will be dismissed for lack of subject matter jurisdiction.

Supreme Court, U. S.
FILED
DEC 30 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1976
CERTIORARI GRANTED NOVEMBER 15, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDIX

	PAGE
Docket Entries	1a
Complaint	8a
Answer of the United States	13a
Answer and Cross-Claim of Defendant Stencel Aero Engineering Corporation	16a
Motion For Summary Judgment by the United States	22a
Affidavit in Support of Motion of United States For Summary Judgment with attachments 2 and 3	23a
Attachment 2 to Affidavit in Support of Motion	25a
Attachment 3 to Affidavit in Support of Motion	26a

PAGE

Answer to Cross-Claim of Defendant Stencel Aero Engineering Corporation 28a

Motion to Dismiss the Cross-Claim of Stencel Aero Engineering Corporation 30a

Order dated May 15, 1975 ..... 31a

Memorandum dated May 15, 1975 ..... 32a

Order dated June 4, 1975 ..... 35a

Opinion of the Eighth Circuit 36a

Order Granting Certiorari 56a

Affidavit of Service 57a

Docket Entries

DOCKET ENTRIES IN THE DISTRICT COURT OF THE EASTERN DISTRICT OF MISSOURI

Date	*Proceedings*
October 11, 1974	Complaint filed and Summons issued. Jury requested.
November 19, 1974	On motion, Defendant Stencel Aero Engineering Corporation granted until December 16, 1974 to move, answer or otherwise respond. All objections to process and venue reserved.
December 13, 1974	On motion, Defendant Stencel Aero Engineering Corporation granted until Monday, January 6, 1975 to move, answer or otherwise respond or object to jurisdiction, venue or service of process.
December 16, 1974	Answer filed by Defendant United States of America.
January 7, 1975	Answer and Cross-Claim of Stencel Aero Engineering Corporation filed.
January 9, 1975	Motion for Order Requiring Defendant United States of America to Preserve Tangible Evidence, and Suggestions in Support filed by Stencel Aero Engineering Corporation.
January 20, 1975	Motion for Summary Judgment against Plaintiff with Memorandum in Support and Attached Exhibits

Docket Entries

Date	*Proceedings*
	"A" and "B" of Defendant United States of America filed.
January 24, 1975	Motion of Defendant Stencel Aero Engineering Corporation filed January 9, 1975, granted.
February 10, 1975	First Supplemental Memorandum in Support of Motion for Summary Judgment against Plaintiff with Attached Exhibits A-4 and A-5 filed by Defendant United States of America.
March 7, 1975	Answer to Cross-Claim of Defendant Stencel Aero Engineering Corporation filed by Defendant United States of America.
March 13, 1975	Motion to Dismiss the Cross-Claim of Stencel Aero Engineering Corporation with attachments filed by Defendant United States of America.
March 14, 1975	By Leave of Court, Defendant Stencel Aero Engineering Corporation granted to and including March 27, 1975 in which to file suggestions in opposition to motion of Defendant United States of America to Dismiss Cross-Claim; Defendant Stencel Aero Engineering Corporation also requests Oral Argument on said Motion.
March 28, 1975	By Leave of Court, Defendant Stencel Aero Engineering Corporation granted to and including April 10, 1975 to

Docket Entries

Date	*Proceedings*
	file suggestions in opposition to Motion of United States of America to Dismiss Cross-Claim.
April 7, 1975	Memorandum in Opposition to Motion of United States of America to Dismiss Cross-Claim filed by Stencel Aero Engineering Corporation.
April 25, 1975	Supplemental Memorandum in Support of Motion to Dismiss the Cross-Claim of Defendant Stencel Aero Engineering Corporation filed by Defendant United States of America.
April 26, 1975	Motion of Defendant United States of America to Dismiss Cross-Claim of Defendant Stencel Aero Engineering Corporation argued and submitted.
May 15, 1975	Memorandum and Order sustaining the Motion of Defendant United States of America for Summary Judgment against the Plaintiff and further sustaining the Motion of Defendant United States of America to dismiss the Cross-Claim of Defendant Stencel Aero Engineering Corporation with prejudice.
May 20, 1975	Motion for Entry of Final Judgment pursuant to Federal Rule 54(b) with Memorandum in Support filed by Defendant Stencel Aero Engineering Corporation.

Docket Entries

Date	*Proceedings*
June 6, 1975	By Leave of Court First Amended Complaint filed by Plaintiff with Request for Issuance of Summons to Defendants Mills Manufacturing, Pioneer Parachute Company, Inc., Pioneer Recovery Systems, Inc., North American Rockwell Corporation, North American Rockwell, Rockwell International.
June 10, 1975	Notice of Appeal filed by Defendant Stencel Aero Engineering Corporation.
June 13, 1975	Answer of Stencel Aero Engineering Corporation to First Amended Complaint filed.
July 10, 1975	By Leave of Court, Defendant North American Rockwell Corporation and Rockwell International granted 30 days within which to plead.
August 11, 1975	Motion of Defendant Mills Manufacturing Corporation to Dismiss Counts III & IV as to Defendant Mills Manufacturing Corporation.
August 15, 1975	Separate Answer of Defendant Pioneer Recovery Systems to First Amended Complaint filed.
August 15, 1975	Separate Answer of Defendant Pioneer Parachute Company, Inc. to First Amended Complaint filed.

Docket Entries

Date	*Proceedings*
August 29, 1975	Answer of Defendant North American Rockwell to the First Amended Complaint filed.
October 7, 1975	Order entered granting Motion of Defendant Mills Manufacturing Corporation to Dismiss Counts III & IV of the First Amended Complaint.
March 11, 1976	By Leave of Court Second Amended Complaint filed by Plaintiff.
June 1, 1976	Answer of Defendant Pioneer Recovery Systems, Inc. to Plaintiff's Second Amended Complaint filed.
June 1, 1976	Separate Answer of Defendant Pioneer Parachute Company, Inc. to Plaintiff's Second Amended Complaint filed.
June 1, 1976	Answer of Defendant Stencel Aero Engineering Corporation to Plaintiff's Second Amended Complaint filed.
June 4, 1976	By Leave of Court, Answer of Defendants North American Rockwell Corporation, North American Rockwell and Rockwell International to Plaintiff's Second Amended Complaint filed.
June 9, 1976	First Amended Answer of Defendant Stencel Aero Engineering Corporation to Plaintiff's Second Amended Complaint filed.

Docket Entries

Date	*Proceedings*
July 29, 1976	Answer of Defendant Mills Manufacturing Corporation to Second Amended Complaint filed.
November 8, 1976	Second Amended Answer of Defendant Stencel Aero Engineering Corporation to Second Amended Complaint of Plaintiff filed.

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Date	*Proceedings*
July 17, 1975	Appeal docketed.
October 9, 1975	Appendix and Brief of Appellant Stencel Aero Engineering Corporation. Filed.
December 12, 1975	Brief of Appellee the United States of America filed.
December 19, 1975	Submitted to Screening Panel.
December 31, 1975	Order that Appellant Stencel Aero Engineering Corporation may have through January 13, 1976 to serve and file Reply Brief filed.
January 13, 1976	Reply Brief of Appellant Stencel Aero Engineering Corporation filed.
February 11, 1976	Argued and Submitted to Judges Gibson, Bright, Van Pelt. Thomas Whalen for Appellant Stencel Aero

Docket Entries

Date	*Proceedings*
	Engineering Corporation; Thomas Martin, Department of Justice for Appellee United States of America. Rebuttal by Mr. Whalen. Record.
June 4, 1976	Opinion by Judge Bright filed (Published).
June 4, 1976	Judgment: Order of District Court dismissing Stencel's Cross-Claim is affirmed. Filed.
June 14, 1976	Bill of Costs of Appellee United States of America filed.
June 29, 1976	Mandate Issued.
September 7, 1976	Notice of Filing of Petition for Writ of Certiorari in Supreme Court as Case No. 76-321.
November 15, 1976	Order of Supreme Court granting Certiorari in Case No. 76-321. Filed.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

Civil Action No. 74-711C(4)

JOHN C. DONHAM,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
STENCIL AERO ENGINEERING CORPORATION,
and MILLS MANUFACTURING CORPORATION,

Defendants.

COUNT I

Comes now the plaintiff in the above captioned cause and for Count I of said petition, states and alleges:

1. The plaintiff is a citizen of the State of Missouri, presently residing at 720 Alice, Dexter, Missouri 63841.

2. That plaintiff has duly performed all of the requirements under Title 28 U. S. C. Chapter 171, Sections 2, 6, 7, 1 et seq.

3. The defendant, United States, may be served through the Honorable John L. McLucas, Secretary, Department of the United States Air Force, Pentagon, Washington, D. C. 20301. The defendant, Stencil Aero Engineering

Complaint

Corporation is a North Carolina corporation duly incorporated and existing under and by virtue of law and having its principle place of business and office and where service may be obtained at 18½ Church Street, Asheville, North Carolina, 28801. The defendant, Mills Manufacturing Corporation, is a New York corporation duly organized and existing under and by virtue of law and having its principle place of business and offices where service may be obtained at the Insurance Building, Raleigh, North Carolina 27602.

4. Jurisdiction arises under the Federal Tort Claims Act against the United States Government, and on negligence as to the other named defendants, and by reason of the fact that the amount in controversy exceeds Ten Thousand Dollars ($10,000.00) excluding interest and costs.

5. On or about the 9th day of June, 1973, plaintiff, an Air Reserve Force pilot, in an inactive duty for training status, assigned to the 110th Tactical Fighters Squadron, 131st Tactical Fighter Group, Missouri Air National Guard, Lambert International Airport, St. Louis, Missouri, while piloting an F-100D fighter aircraft, Serial No. 552947, in the aero space over the eastern sector of Missouri, was forced to eject from his aircraft, using his egress life support system which caused serious and permanent injury to the plaintiff as more specifically set forth herein.

6. Plaintiff further states that he was forced to use the defendant United States Air Force and the Defendant Corporation's egress life support system in a manner in which the system was intended to be used, and as a direct result of an inherent defect not known to the plaintiff,

plaintiff was thereby caused to sustain serious and permanent injuries as more specifically set forth herein.

7. Plaintiff further states that as a direct and proximate result of said malfunction of his egress life support system, precipitated by the negligence and carelessness of the defendants individually and jointly, plaintiff sustained serious and permanent and disabling injuries to his left arm, back, bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, cartilages, discs, and parts thereof were seriously bruised, contused, lacerated, torn, wrenched, swollen, twisted, weakened, strained, sprained, impinged, and inflamed; and plaintiff was caused to sustain a noncommitant rupture of the brachial plexus nerve member and all the surrounding nerves, muscles, tendons, tissues, membranes, nerve roots, blood vessels, and parts thereof of the left arm; and the total arm to and including the shoulder and all of its parts are completely and permanent impaired, diminished and made painful, and said form is unfunctional in nature, and the function and use of all said parts and organs are seriously and permanently and totally impaired.

8. Plaintiff further states that he has lost wages and income as a direct result of the carelessness and negligence of the defendants in the approximate sum of Ten Thousand Dollars ($10,000.00) to date, and will in the future, incur additional loss of income; as a direct and proximate result of said injuries, his earning capacity has been obliterated and reduced to such an extent that he shall be incapable of earning sufficient moneys with which to support himself and his family; and plaintiff has been caused to incur extensive and painful medical care, attention, treatment

and therapy, and will in the future, be required to incur additional medical care, attention, treatment and therapy; and plaintiff has been caused to be hospitalized, and will in the future, be caused to be hospitalized as a direct and proximate result of the negligence and carelessness of the defendants aforesaid.

9. Plaintiff further states that said injuries are of a total and permanent nature, and that he will for all time be permanently and totally disabled from performing any services in any gainful occupation on the open labor market commensurate with his station in life and ability, especially the occupations requiring the use of the left hand, wrist, elbow, shoulder, and total arm in aviation as a pilot or co-pilot; or any other related positions for which he may be qualified.

WHEREFORE, plaintiff John C. Donham prays judgment against the United States of America in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) together with his costs expended herein.

COUNT II

Again comes the plaintiff in the above captioned cause and for Count II of said petition, states and alleges:

1. The defendants Stencil Aero Engineering Corporation and Mills Manufacturing Corporation are corporations duly organized and existing under and by virtue of the law of the State of North Carolina and New York.

2. Plaintiff incorporates by reference each and every allegation contained in Paragraph No. 1 through No. 9 of Count I of said petition as if specifically pleaded.

Complaint

WHEREFORE, plaintiff prays judgment against the defendant, Stencil Aero Enginering Corporation and Mills Manufacturing Corporation in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

Jury trial is hereby demanded as to all defendants.

Filed October 11, 1974

Answer of the United States

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America, by and through its attorneys and in answer to the allegations contained in plaintiff's complaint, states and avers as follows:

Response to Count I

1. The allegations of paragraphs 2 and 4 of Count I of plaintiff's complaint are conclusions of law which require no answer and are referred to the Court for determination.

2. The United States denies the allegations of paragraphs 6 and 7 of Count I of plaintiff's complaint.

3. The United States denies the allegations of paragraphs 1, 8 and 9 of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

4. Responding to the allegations contained in paragraph 3 of Count I of plaintiff's complaint, the United States affirmatively asserts it may be served as provided by Federal Rule of Civil Procedure 4(d)4 and not as plaintiff asserts. All other allegations of paragraph 3 of Count I of plaintiff's complaint are denied for lack of information sufficient to form a belief as to their truth.

5. Responding to the allegations of paragraph 5 of Count I of plaintiff's complaint, the United States admits plaintiff was a member of the Missouri Air National

Guard on June 9, 1973 while piloting an F-100D aircraft while on inactive duty for training under the provisions of 32 U.S.C. §502. Responding further, the United States admits plaintiff ejected from his aircraft over the eastern sector of Missouri. All other allegations of paragraph 5 of Count I of plaintiff's complaint are denied.

Response to Count II

1. The United States denies the allegations of paragraph 1 of Count II of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

2. Responding to the allegations of paragraph 2 of Count II of plaintiff's complaint, the United States incorporates by reference each and every response contained in paragraphs 1 to 9 of Count I as is fully set out herein.

AFFIRMATIVE DEFENSES

1. Plaintiff's complaint fails to state a cause of action upon which relief can be granted against the United States.

2. Any liability that may exist for plaintiff's alleged injury lies in a third party, not the United States.

3. The provisions of 28 U.S.C. §2680(a) are applicable to this defendant.

4. The provisions of 28 U.S.C. §2680(h) are applicable to this defendant.

5. Plaintiff's ejection from the aircraft was made in connection with, subject to and with acceptance of the known risks and dangers of ejecting from the aircraft and

over which this defendant had no control; the plaintiff assumed, accepted and understood all said risks and dangers, of which he had actual or constructive knowledge; and plaintiff's alleged injuries arose out of and resulted from said risks and dangers.

6. Defendant, United States of America, denies that any negligent or wrongful act or omission on the part of any agent or representative of the United States caused or contributed to plaintiff's alleged injuuries.

7. Plaintiff's own negligence caused or contributed to the accident and the damages sued for herein.

Wherefore, defendant, United States of America, demands judgment dismissing the complaint herein, together with its costs and disbursements and for such other further and different relief which the Court may deem just and proper.

Filed
December 16, 1974

(Certificate of Service Omitted in Printing.)

Answer and Cross-Claim of Defendant Stencel Aero Engineering Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title Omitted in Printing]

Comes now defendant Stencel Aero Engineering Corporation (incorrectly sued herein as Stencil Aero Engineering Corporation) and for its answer to the Complaint herein states as follows:

COUNT I

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6 of Count I of the Complaint, inclusive except that defendant Stencel Aero Engineering Corporation admits that it is a corporation duly organized and existing under and by virtue of the laws of North Carolina and as such is a citizen of North Carolina, as alleged in paragraph 3, and defendant Stencel Aero Engineering Corporation further admits that the amount in controversy exceeds $10,000 exclusive of interest and costs as alleged in paragraph 4.

2. Defendant denies the allegations in paragraphs 7, 8 and 9 of Count I of the Complaint.

COUNT II

3. For answer to paragraph 1 of Count II of the Complaint, defendant admits that Stencel Aero Engineering

Answer and Cross-Claim of Defendant Stencel Aero Engineering Corporation

Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

4. For answer to paragraph 2 of Count II of the Complaint, defendant Stencel Aero Engineering Corporation repeats, realleges and incorporates herein by reference its answers to paragraphs 1 through 9 of Count I of the Complaint set forth above with the same force and effect as if set forth herein in full.

FIRST AFFIRMATIVE DEFENSE

5. For its first affirmative defense to the Complaint, defendant states that whatever injuries or damages may have been sustained by plaintiff as alleged in the Complaint herein were caused by or contributed to by the negligence and carelessness of the plaintiff, and such negligence and carelessness contributed directly and proximately to the happening of any said injuries or damages, and defendant Stencel Aero Engineering Corporation, therefore, is not liable to the plaintiff.

SECOND AFFIRMATIVE DEFENSE

6. For its second affirmative defense to the Complaint of plaintiff, defendant states that, at the time it left defendant Stencel Aero Engineering Corporation's custody and control, the modification kit to the seat ejector system, including any parts or components of said modification kit, which was installed on the aircraft described in the Complaint was not unreasonably dangerous or defective,

and was produced in accordance with the plans and specifications of defendant Stencel Aero Engineering Corporation and was safe, of merchantable quality, and contained no inherent defect.

THIRD AFFIRMATIVE DEFENSE

7. For its third affirmative defense to the Complaint of plaintiff, defendant states that at and immediately prior to the time of the incident alleged in the Complaint, plaintiff was aware of the condition of the aircraft and its component parts involved in this action and did knowingly and voluntarily proceed to operate the aircraft and did knowingly and voluntarily assume whatever risks were involved in operating said aircraft at the time of the incident alleged in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

8. For its fourth affirmative defense to the Complaint of plaintiff in this action, defendant Stencel Aero Engineering Corporation alleges, upon information and belief, that at the time of the incident alleged in the Complaint the aircraft and its component parts were not being used by plaintiff for the purpose for which they are intended to be used but instead were being misused.

WHEREFORE, defendant Stencel Aero Engineering Corporation prays for judgment dismissing the Complaint, together with costs and disbursements of this action and such other and further relief as the court may deem proper and affirmative.

CROSSCLAIM

Comes now defendant Stencel Aero Engineering Corporation and for its crossclaim against defendant United States of America alleges and states as follows:

9. This crossclaim is within the ancillary jurisdiction of this court for the reason that the claim for relief set forth herein arises out of the same transaction or occurrence that is the subject matter of plaintiff's Complaint.

10. Plaintiff has alleged in his Complaint that he was seriously and permanently injured as a result of using an egress life support system while piloting an F-100D fighter aircraft over the eastern sector of Missouri. Plaintiff further alleges that said egress life suport system malfunctioned and that such malfunction was precipitated by the negligence and carelessness of the defendants individually and jointly.

11. If all or some portion of the egress life support system which plaintiff alleges to have used in connection with the accident referred to in his Complaint was manufactured by defendant Stencel Aero Corporation, then such system or portion thereof was manufactured by defendant Stencel Aero Engineering Corporation according to the specifications and requirements provided by defendant United States and, in some instances, using components supplied by the United States or other persons under contract with the United States.

12. In all respects in the manufacturing any such egress life support system or any portion thereof, defendant

Answer and Cross-Claim of Defendant
Stencel Aero Engineering Corporation

Stencel Aero Engineering Corporation acted in a careful and prudent manner.

13. At the time it left defendant Stencel Aero Engineering Corporation, any such system or portion thereof was not unreasonably dangerous or defective and was safe, of merchantable quality and contained no inherent defect.

14. At all times after manufacture of any such egress life support system or any portion thereof by defendant Stencel Aero Engineering Corporation said system was in the custody and control of defendant United States and its agents and was from time to time repaired and maintained by said United States.

15. In the event plaintiff obtains judgment against defendant Stencel Aero Engineering Corporation in this action, defendant United States will be liable pursuant to 28 U.S.C. §2674 to indemnify defendant Stencel Aero Engineering Corporation for the reason that defendant United States was actively negligent in the actions, events and omissions alleged in the Complaint, if in fact such actions, events and omissions constitute negligence, and the negligence of defendant Stencel Aero Engineering Corporation, if any, was passive only.

16. This defendant has been and will be compelled to incur attorneys' fees and expenses in this action and is entitled to recover the amount of such fees and expenses from defendant United States.

WHEREFORE, defendant Stencel Aero Engineering Corporation prays that this court enter judgment against defendant United States for any and all sums that may be adjudged against defendant Stencel Aero Engineering Corporation in favor of the plaintiff in this cause, and further for judgment against defendant United States for its reasonable attorneys' fees and expenses incurred in this action.

Answer and Cross-Claim of Defendant
Stencel Aero Engineering Corporation

(Certificate of Service Omitted in Printing.)

Filed January 7, 1975

Motion For Summary Judgment by the United States

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

Civil No. 74-711C (4)

[Title Omitted in Printing]

Defendant United States of America pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in the above-titled action on the ground that the Court is without jurisdiction and the complaint fails to state a claim upon which relief can be granted in that plaintiff's injury was incurred incident to his military service and that recovery in such instances is precluded by the Supreme Court decisions in *Feres* v. *United States*, 340 U.S. 135 (1950). Plaintiff's complaint fails to state a claim upon which relief can be granted. The United States is entitled to judgment as a matter of law.

FILED

January 20, 1975

Affidavit in Support of Motion of United States For Summary Judgment

[Title Omitted in Printing]

I, JAMES P. PIPER, being first duly sworn, depose and say:

That I am a Major in the United States Air Force, currently assigned as Assistant Chief, Claims Division, Office of The Judge Advocate General, USAF, Washington, D. C. In this capacity I am responsible for administrative claims filed against the Air Force under 28 U.S.C. 2671-2680 and for assisting other government agencies in the adjudication, settlement and litigation of administrative claims filed against them involving Air Force personnel, property or activities.

That in this capacity I have examined the Air Force Personnel Records pertaining to Captain John Clyde Donham.

That this affidavit is made in support of the Defendant's, United States of America's, motion to dismiss.

That I am familiar with this litigation.

That reference will be made in this affidavit to the following extracts of the official Air Force Personnel Records pertaining to Captain John Clyde Donham:

Computer summary and history of pay records of Captain John Clyde Donham is Attachment 1 hereto.

Special Order Number AC-2722, dated 25 January 1974 and issued by Department of the Air Force, Washington, D. C., is Attachment 2 hereto.

Letter from AFMPC/DPMRA2/t5p, Randolph AFB, Texas, dated 29 January 1974, Subject: Disability Retirement (Permanent) is Attachment 3 hereto.

That Captain John Clyde Donham received disability pay under the provisions of 32 U.S.C. 318 in the following amounts on the following dates: (See Attachment 1).

Affidavit in Support of Motion of United States for Summary Judgment

30 June 1973	$1,093.49
9 July 1973	835.00
16 July 1973	751.09
22 August 1973	751.09
15 September 1973	751.09
30 September 1973	751.09
15 October 1973	751.09
31 October 1973	691.74
15 November 1973	691.74
15 December 1973	1,383.44
28 December 1973	691.74
15 January 1974	691.74
31 January 1974	691.74
15 February 1974	645.62

That Captain John Clyde Donham was determined to be physically disqualified for the performance of active military service and was permanently retired effective 15 February 1974. See Attachments 2 and 3.

That Captain John Clyde Donham received active duty training pay in the total amount of $83.91 for performing during an entire day's Unit Training Activity on 9 June 1973. See Attachment 1.

/s/ JAMES P. PIPER
JAMES P. PIPER, Major, USAF
Assistant Chief, Claims Division
Office of The Judge Advocate General

Subscribed and sworn to before me this 17th day of January 1975 in the City of Washington, District of Columbia.

/s/ MABEL M. BURNASSOR

Attachment 1 to Affidavit in Support of Motion

[Omitted in Printing]

Attachment 2 to Affidavit in Support of Motion

Retirement Order t5p

January 25, 1974

Special Order Number AC-2722

DEPARTMENT OF THE AIR FORCE, WASHINGTON

Under the provisions of Section 1204 and 1372, Title 10 USC, CAPTAIN JOHN C. DONHAM, 356-34-7225, Reserve AF (ANGUS), is relieved from assignment 110 Tactical Fighter Sq, TAC, PO Box 10038, Lambert Field MO 63145, and Permanently Retired for disability and transferred to the Retired Reserve Section effective 15 February 1974. Present Address: 720 Alice Street, Dexter MO 63841; SDN 77M; Active Service for Retirement: 03 years, 02 months, 24 days; Service for Basic Pay: 09 years 00 months, 22 days; Service per Section 1333, Title 10 USC: 04.45. Grade Retired in: Captain; Highest Grade Held on Active Duty: Captain; Date of Birth: 9 Oct 42; Compensable Percentage of Physical Disability: 80%. Disability Received in Line of Duty as a Direct Result of Armed Conflict or Caused by an Instrumentality of War and Incurred in Line of Duty During a Period of War: Yes.

By Order of the Secretary of the Air Force

George S. Brown,
General, USAF
Chief of Staff

(Seal)

Jack R. Benson, Colonel, USAF
Director of Administration

Distribution:

A–Officers	XX C–Officers	
		50 copies:
B–Airman	D-Airman	AFMPC/DPMARA2

Attachment 3 to Affidavit in Support of Motion

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20330

(seal)

29 January 1974

Reply to
attn of:

AFMPC/DPMARA2/t5p
Randolph AFB Texas 78148

Subject:

Disability Retirement (Permanent)

To:

Chief, National Guard Bureau/DPMA
Washington DC 20310

1. Under the provisions of Chapter 61, Title 10 USC (AFM 35-4), the following determinations were made in the Office of the Secretary of the Air Force with respect to Captain John C. Donham, 356-34-7225, 110 Tactical Fighter Sq, TAC, PO Box 10038, Lambert Field MO 63145:

a. The member is physically disqualified for the performance of active military service.

b. The member is being permanently retired effective 15 February 1974 (copies of retirement orders attached).

Attachment 3

2. Upon completion of administrative processing required by your Headquarters, the inclosed orders should be forwarded to the member.

FOR THE CHIEF OF STAFF

/s/ Jack W Reiner LCol
Max L. Pettijohn, Colonel, USAF
Directorate of Personnel
Program Actions

1 Atch
DAFSO AC-2722, 25 Jan 74
(50 copies)

Cy to: 110 Tac Ftr Sq, TAC
Lambert Fld MO 63145

Answer to Cross-Claim of Defendant Stencil Aero Engineering Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America, and for its answer to the cross-claim of Stencil Aero Engineering Corporation states and avers as follows:

1. The United States denies the allegations of paragraphs 9, 11, 12, 13, 14, 15 and 16 of the Cross-Claim of Defendant Stencil Aero Engineering Corporation.

2. Responding to the allegations of paragraph 10 of the Cross-Claim of Defendant Stencil Aero Engineering Corporation, the United States admits Captain John C. Donham was a member of the Missouri Air National Guard on June 9, 1973, and while piloting an F-100D aircraft over the eastern sector of Missouri, ejected from said aircraft. All other allegations and inferences of paragraph 10 are denied.

AFFIRMATIVE DEFENSES

1. The cross-claim fails to state a cause of action upon which relief can be granted against the United States.

2. The provisions of 28 U.S.C. §2680(a) and (h) are applicable to the United States.

3. The United States denies that any negligent or wrongful act or omission on the part of any agent or

representative of the United States caused or contributed to plaintiff's alleged injury.

4. Any liability that may exist for plaintiff's alleged injury lies in a third party, not the United States.

WHEREFORE, cross-defendant, United States of America, demands judgment dismissing the cross-claim herein, together with its costs and disbursements and for such other further and different relief which the Court may deem just and proper.

Filed March 7, 1975

(Certificate of Service Omitted in Printing.)

Motion to Dismiss the Cross-Claim of Stencel Aero Engineering Corporation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

[Title Omitted in Printing]

Now comes defendant, United States of America pursuant to the provisions of Federal Rules of Civil Procedure 12(b)(1) and (6) and moves the Court to dismiss the cross-claim of Stencel Aero Engineering Corporation against the United States.

The United States contends: (1) the existence of an exclusive system of compensation to Captain John C. Donham precludes Stencel's cross-claim against the United States; and, (2) the applicability of the *Feres* military discipline policy to the instant case precludes Stencel's cross-claim against the United States.

For the foregoing separate, independent reasons which are outlined in the attached Memorandum, the United States urges the Court to conclude it lacks jurisdiction and that the cross-claim fails to state a claim upon which relief can be granted. Therefore, the United States requests the Court to dismiss Stencel's cross-claim against the United States.

(Certificate of Service Omitted in Printing.)

Filed March 13, 1975

Order dated May 15, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title Omitted in Printing]

Pursuant to a memorandum of the Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the motion of the United States for summary judgment against the plaintiff be and is sustained; and

IT IS FURTHER ORDERED that the motion of the United States to dismiss the cross-claim of the defendant Stencel Aero Engineering Corporation be and is sustained with prejudice.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: May 15, 1975.

Memorandum dated May 15, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74—711 C (4)

[Title Omitted in Printing]

This action is before the Court upon the motions of the defendant United States for summary judgment against the plaintiff John C. Donham and to dismiss the cross-claim of co-defendant Stencel Aero Engineering Corporation ("Stencel").

Plaintiff seeks substantial damages against the United States and two private corporations for injuries sustained when, as a Missouri Air National Guard pilot, he was forced to eject from his jet aircraft in flight over Missouri. He alleges that a defect in the egress life support system, precipitated by defendants' negligence, caused his injuries. The action is brought pursuant to the Federal Tort Claims Act ("Act"), 28 U.S.C. §§2671-2680; diversity of citizenship is alleged to exist.

The United States moves for summary judgment on the ground that plaintiff's injury was incurred incident to his military service and that recovery against the United States under the Act is precluded by the teachings of *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demko,* 385 U.S. 149 (1966). The Supreme Court in *Feres* ruled that the United States is not liable under the Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U.S. *at* 146. In *Demko* the Court ruled that a federal prisoner, injured in the performance of an assigned prison task, was limited to his exclusive statutory remedy of compensation under 18 U.S.C. §4126. He was precluded from suit under the Federal Tort Claims Act. *Feres* and *Demko* are sought to be applied alternatively by the United States.

The Court is of the opinion that plaintiff's status as a Missouri Air National Guard pilot is sufficiently related to federal military service to apply the *Feres* ruling to bar his claim against the United States. 10 U.S.C. §§8062, 8077 and 8499; 32 U.S.C. §§104, 106, 110, 502; 27 U.S.C. §301. *See also Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), *cert. den.,* 368 U.S. 990 (1961). Since the *Feres* ruling is founded on the doctrine of sovereign immunity, the Court will dismiss plaintiff's claim against the United States for lack of subject matter jurisdiction.

Stencel seeks indemnification against the United States by cross-claim alleging that Stencel manufactured the life egress system according to government specifications, that after manufacture the system was in the custody of and maintained by the United States, and that if at all Stencel's alleged negligence is passive and that of the United States is active. The United States argues that, to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly.

The Court agrees with the United States. In *Terminal R. Ass'n. of St. Louis* v. *United States,* 182 F.2d 149 (8th Cir. 1950), *cert. den.,* 340 U.S. 825 (1950), the Court of Appeals ordered dismissed for lack of subject matter jurisdiction a claim for indemnity against the United States. In that case the injured plaintiff's claim against the United States under the Federal Tort Claims Act was dismissed as barred by sovereign immunity. The plaintiff's

Memorandum dated May 15, 1975

claim arose prior to the effective date of the Act. The immunity of the United States to plaintiff's claim rendered the claim for indemnity an "ethical" one only. That case governs Stencel's claim for indemnity against the United States. It will be dismissed for lack of subject matter jurisdiction.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: May 15, 1975.

Order dated June 4, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74—711 C (4)

[Title Omitted in Printing]

Upon motion of defendant Stencel Aero Engineering Corporation, pursuant to Rule 54(b), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that the order of the Court filed May 15, 1975, dismissing the cross-claim of defendant Stencel Aero Engineering Corporation against the United States, be and is entered as a final judgment with respect to said cross-claim, the Court having determined that there is no just reason for delay.

/s/ JOHN F. NANGLE
John F. Nangle
United States District Judge

Filed: June 4, 1975.

Opinion of the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1516

Submitted: February 11, 1976. Filed: June 4, 1976.

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,
STENCEL AERO ENGINEERING CORP.,
and MILLS MANUFACTURING CORP.,

Defendants.

STENCEL AERO ENGINEERING CORP.,

Cross-Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Cross-Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Before:

GIBSON, *Chief Judge;* BRIGHT, *Circuit Judge;* and
VAN PELT, *Senior District Judge.**

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* ROBERT VAN PELT, Senior District Judge, District of Nebraska, sitting by designation.

Opinion of the Eighth Circuit

BRIGHT, *Circuit Judge.*

This appeal presents an important issue under the Federal Tort Claims Act (FTCA): whether the United States which is immune to liability for its negligent conduct producing injury and damages to an on-duty serviceman may, nevertheless, be obligated indirectly to pay the amount of such damages through a claim for tort indemnity asserted by a third party who becomes liable for tort damages to that serviceman. We answer that issue in the negative.

Captain John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, while flying over Eastern Missouri, ejected from his military aircraft under emergency conditions. As a result of the malfunctioning of his aircraft's "egress life support system," he claims to have sustained serious and permanent injuries. This incident gives rise to the present appeal. Stencel Aero Engineering Corporation (Stencel) manufactured this system. Donham brought an action to recover for his bodily injuries, and he named as defendants, Stencel, the United States, and Mills Manufacturing Corporation. Stencel answered the complaint denying any liability and instituted a cross-claim against the United States for total indemnity.

The United States moved for judgment on the pleadings against both Captain Donham and Stencel. In response to this motion, the district court dismissed Captain Donham's action against the United States on grounds of sovereign immunity, relying upon *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demco,* 385 U.S. 149 (1966). Relying on these same cases, the district court also dismissed Stencel's cross-claim for indemnity. The court certified its disposition of Stencel's cross-claim as a final

appealable judgment under Rule 54(b), Fed. R. Civ. P., and Stencel now appeals that judgment.[1]

Although the doctrine of *Feres* v. *United States, supra,* precludes Captain Donham from proceeding directly against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674, that doctrine, according to Stencel's contention, does not preclude Stencel as a non-military third party from obtaining restitution by way of indemnity against the United States for any damages which it might be compelled to pay to Donham. Stencel alleges that it manufactured and constructed the ejection system according to specifications and requirements provided by the United States and, in part, using components supplied by the United States.[2] After manufacture, Stencel alleges that the United States took custody and control of the egress system and assumed responsibility to repair and maintain the system and to warn and instruct government employees in its proper use.

Stencel alleges that these facts imposed an independent duty upon the United States to assure Stencel that the system was not defective or inherently dangerous. Stencel

[1] Neither the plaintiff, Captain Donham, nor a third defendant, Mills Manufacturing Corporation, is a party to this appeal. We are concerned here only with the rights, if any, of Stencel to seek indemnity against the United States for the claim made against it by the serviceman. Since judgment was granted prior to any discovery, we are concerned only with the facts as pleaded.

[2] The Government's brief cites several cases which suggest that these allegations, if true, may constitute a defense by Stencel to Captain Donham's complaint. *See, e.g., Littlehale* v. *E.I. du Pont de Nemours & Co.*, 268 F. Supp. 791, 804 (S.D. N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967); *Myers* v. *United States*, 323 F.2d 580 (9th Cir. 1963); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961). This question is not before us.

argues that should it suffer any liability because of Government's breach of its duty, it should recover indemnification in full. Further, Stencel alleges that if Donham's injuries resulted from negligence, the Government's conduct constituted active negligence but Stencel's improper conduct, if any, constituted passive negligence. Stencel argues that such a disparity of fault gives rise to a right of indemnity in favor of Stencel. Stencel asserts, appropriately, that judgment on the pleadings for dismissal can be sustained only if it is clear beyond doubt that Stencel could prove no set of facts in support of its indemnity claims, entitling it to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Bramlet* v. *Wilson*, 495 F.2d 714, 716 (8th Cir. 1974).

Stencel relies upon the Supreme Court's statement that through the FTCA the United States has waived its immunity from tort suits in "sweeping language." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951).[3] Generally, the United States subjects itself to suit under the FTCA to the same extent as a private individual under similar circumstances in accordance with the law of the state where the tort occurred. Stencel cites several Missouri cases for the proposition that indemnity relief would be available to it under state law. *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City Southern Ry. Co.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v.

[3] 28 U.S.C. §2674 (Federal Tort Claims Act), in part provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The jurisdictional counterpart of this provision is contained in 28 U.S.C. §1346(b).

Shell Oil Co., 413 S.W.2d 550 (Mo. App. 1967). While the United States denies that Missouri law authorizes indemnity under similar circumstances, it asserts as its principal defense that federal law applies and that a claim for damages sustained by a serviceman on active duty, whether asserted directly by that serviceman or indirectly by a third party by way of indemnity, is barred by application of the doctrine of the *Feres* case.

I. *The Scope of the Federal Government's Waiver of Sovereign Immunity Is a Question of Federal Law.*

The Federal Tort Claims Act substantially changed prior law. First, it waived the Government's sovereign immunity to most tort actions and provided for suits against the United States in the federal district courts. Second, it adopted the substantive law of the state in which the tort occurred as the standard of conduct to assess the Government's liability. Since, as we have previously observed, the scope of the waiver of sovereign immunity is quite broad, federal courts have usually focused upon interpretation and application of state law in resolving claims for indemnity.[4]

However, the extent of the waiver remains an important consideration. Without a waiver of sovereign immunity applying to the claim asserted, the claim against the Government must fall. Where a question arises as to the extent of the waiver of sovereign immunity under the

[4] *See, e.g., Adams* v. *General Dynamics Corp.*, No. 74-3484 (9th Cir., Apr. 15, 1976) (California law); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975) (Louisiana law; *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1969) (Arkansas law); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (Nevada law).

FTCA, the issue "is a question of federal law, separate and prior to the question of • • • liability under state law." *See Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 952 (2d Cir. 1975); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 883 (3d Cir. 1974).

II. *The United States Has Not Consented Under the Federal Tort Claims Act to be Sued for Indemnity by a Government Contractor Who is Liable to a Serviceman for Injuries Occurring on Active Duty.*

Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b). That the Act incorporates such state standards is a matter "not without significance" in determining "whether the Act should be construed to apply • • •." *Feres* v. *United States, supra*, 340 U.S. at 142. Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state law apply to situations arising out of these two relationships.

Each of these relationships long has been held to be governed exclusively by federal law. In *Feres*, the Supreme Court reaffirmed the long-recognized rule that the "relationship between the Government and members of its armed forces is 'distinctively federal in character • • •.'" 340 U.S. at 143, *quoting United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). In *Standard Oil*, the court emphasized that

> [t]o whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. [*Id.* at 305-06.]

Likewise, it is firmly established that the rights and duties of the United States arising pursuant to its contractual obligations primarily are governed by federal common law. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958); *see Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943). *Cf. Whelan* v. *Penn Central Co.,* 503 F.2d 886 (2d Cir. 1974).

Thus, both essential aspects of the current case have long been committed to federal law. To conclude that the general language of the FTCA makes applicable the vagaries of state law would surely be, in the language of *Feres,* to "visit the Government with novel and unprecedented liabilities." 340 U.S. at 142. Again in the language of *Feres,* "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

The rationale of the Court in *Feres* is, we believe, applicable to Stencel's indemnity claims. This bolsters our conclusion that Congress did not intend to permit this type of indemnity claim under the FTCA.

In *Feres,* the Court first observed that the FTCA was not intended to create new and unusual causes of action but was simply intended to permit the application of *appropriate* state law. *Id.* at 142. The Court then noted

that the Government's authority over a member of the Armed Services is without parallel among private parties.[5] In particular, the Government's right to assign a serviceman to active duty in any single state or to several states makes it unreasonable that rights and obligations between the active duty soldier and his government should turn on accidents of political geography. *Id.* at 143. These same considerations militate strongly against Stencel's indemnity claims as well. Precisely because of the Government's unique interests and powers, its contractual obligations with material suppliers are controlled by federal law. The policies behind this rule become particularly compelling when the Government is purchasing military equipment. The Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties. The mobility of the Armed Forces is due, in large part, to military equipment such as Captain Donham's aircraft, which can move rapidly across this country as well as overseas.

It makes little sense to say that the duty of the United States to indemnify Stencel, a North Carolina corporation, should turn upon the fortuity that an aircraft which incorporated a Stencel product happened to crash in Missouri. Thus, since Stencel's relationship to the United

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[5] In commenting upon *Feres,* in a 1954 case, the Court noted the special nature of the military relationship:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. [*United States* v. *Brown,* 348 U.S. 110, 112 (1954).]

See Alexander v. *United States,* 500 F.2d 1 (8th Cir. 1974).

States lies in a military context and the claim arises out of injuries to a serviceman, the underlying rationale of the *Feres* case suggests that provisions of the FTCA should not be read to extend to such relationships. Moreover, we think it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of Stencel to force the United States to indirectly pay those damages.

In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.[6] This result, though not necessarily the rationale, receives support from other decided cases.

Five courts of appeals have faced the question of a claim against the United States under the FTCA for indemnity of claims arising from injury in a military context. All but one of these courts have denied indemnity and contribution.[7] However, the circuits have not adopted

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[6] Stencel has been careful to confine its contract-related claim to the assertion of a duty "*implied in law* out of the relationship between Stencel and the United States * * *." However, Stencel has cited some authority for the proposition that, in at least some government contracts which set detailed standards of performance, an agreement to indemnify is *implied in fact*. *See, e.g., J.D. Hedin Const. Co., Inc.* v. *United States*, 347 F.2d 235, 241 (Ct. Cl. 1965). Such alleged right, if cognizable as a contract right, might be asserted in the Court of Claims under the Tucker Act, 28 U.S.C. §1346(b)(2). *See Murray* v. *United States*, 405 F.2d 1361, 1366 (D.C. Cir. 1968); *cf. Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 999 (3d Cir. 1974).

[7] A number of federal courts have discussed a somewhat analogous issue raised by the exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. §8116(c)) and with varying rationales have either denied or allowed third party recovery for contribution or indemnity from the United States. *See Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); Annot., 12 A.L.R. Fed. 616 (1972).

a consistent rationale and the language of the various opinions cannot be harmonized. Although several of these opinions have said that the *Feres* holding is not a *per se* bar to third party indemnity claims, none has considered whether the considerations underlying *Feres* require a limitation of the right under the FTCA to seek indemnity against the United States for damages paid to compensate for a serviceman's injury.

The most recent decision of which we are aware is *Adams* v. *General Dynamics Corp.*, —— F.2d ——, No. 74-3484 (9th Cir., Apr. 15, 1976). In *Adams*, the Ninth Circuit reaffirmed its prior holdings denying indemnity in *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.) *cert. denied*, 389 U.S. 940 (1967), and *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom., United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (1964). In each of these cases the claims arose out of a collision between a military and a private aircraft resulting from the fault of both pilots. In *Wiener*, the negligence of the military pilot was primarily responsible for the collision. The court permitted United Air Lines to recover full indemnity against the Government for the damages paid all civilian passengers of the private aircraft. However, the court denied any restitution to United Air Lines for damage awards to the civilian and military federal employees injured while flying in the military aircraft.

With respect to the civilian federal employees, the court held that neither "contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor [the United States] to the person injured [the civilian government employees]." *Id.* at 403. The court held that the exclusive liability provision of the

Federal Employees Compensation Act precluded finding the necessary tort liability of the Government to the civilian employees. The court then considered the servicemen cases and ruled that

> [w]ith respect to the two servicemen cases, United's claim for indemnity must fall for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service. Feres v. United States, 340 U.S. 135 * * *. [*Id.* at 404.]

The other two Ninth Circuit cases involve similar facts and reach the same result. All of these decisions rested solely upon tort liabilities; no implied contractual or quasicontractual rights—attenuated or otherwise—were advanced or decided. *Cf. Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

In *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1967), a Navy vehicle collided with a private auto as the result of mutual fault. A serviceman passenger in the Navy vehicle recovered against the private driver. The private driver, in turn, sought to shift part or all of the burden to the United States because of the negligence of the Navy driver. The court construed the claim as one for contribution and denied recovery on the merits. Although the case was technically decided under state law, the Ninth Circuit's decisions in *Wien* and *Wiener, supra,* were cited[8] for the

[8] 382 F.2d at 124. Because of these citations, *Maddux* has been read as applying to indemnity as well as contribution. *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

proposition that such recovery could not be had in the absence of direct liability of the United States to the injured party. Again, no contractual relationship existed between the party seeking indemnity and the United States.

The Tenth Circuit considered a similar issue in *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). There, two contractors had remodeled a building at Hill Air Force Base pursuant to faulty government specifications. A serviceman sustained injuries because of the faulty construction and brought suit against the contractors. The contractors settled the claim for $45,000, then sought indemnity from the United States. The district court dismissed the complaint, holding that *Feres* barred any indemnity and, alternatively, that the contractors were guilty of active negligence in knowingly constructing the building in compliance with patently defective specifications. The Government's negligence in providing the specifications was termed passive.

The Tenth Circuit ruled that the *Feres* doctrine *per se* did not preclude the action for indemnity, and stated in addition that under the Supreme Court's holdings in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., supra; Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*; 355 U.S. 563 (1958); and *Treadwell Construction Co.* v. *United States, supra,* "a party seeking indemnity is not barred at the threshold." 464 F.2d at 1144. However, the court went on to affirm the dismissal of the indemnity claim on the grounds that the contractor's active negligence precluded ordinary tort indemnity and that no implied warranty could be found to support a quasicontractual claim.

The court specifically declined to extend the Supreme Court's admiralty-related cases to cover the situation. The court said:

> [W]e are constrained to hold that neither the *Ryan* nor *Weyerhaeuser* nor any of the other *Ryan* progeny governs. These cases all arise in the admiralty area, and most courts have refused to apply liberally the concept of implied warranty or implied contract to indemnify in other fields. [464 F.2d at 1145 (footnote omitted).]

Appellant-Stencel emphasizes the following language from *Barr*:

> [I]t does not follow [from *Feres*] that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations. [*Id.* at 1143.]

This statement is correct as far as it goes. However, it does not proceed to an analysis of those "different considerations" in light of the *Feres* rationale. In *Barr*, the contractor's own active negligence offered a simple basis for affirming the dismissal. Here, because of the sparse record, we have been compelled to squarely confront the reach of the FTCA in circumstances of this case in light of the underlying rationale of *Feres*.[9]

[9] It is interesting that the Ninth Circuit panel which decided *Adams* v. *General Dynamics Corp.*, *supra*, included both the trial judge in *Barr* and a member of the appellate panel in that case. The *Adams* panel notes that the broad language of *Barr* is somewhat inconsistent with other Tenth Circuit precedent and suggests that the decision should be considered to rest upon the active negligence of the contractors and the passive negligence of the Government. Slip op. at 5 n.6.

That panel observed that the ambiguous holding and peculiar history of *Treadwell Construction Co.* v. *United States*, 372 U.S 772 (1963) (*per curiam*), is of " 'little manifest significance,' " and that the Supreme Court has, in fact, " 'left the issue [of third party indemnity in nonadmiralty cases] squarely undecided.' " Slip op. at 5 n.6, *quoting* Note, *Federal Law—Contribution and Indemnity Under the Federal Employees' Compensation Act*, 6 Toledo L.Rev. 272, 282 n.42 (1974). The *Treadwell* decision seems of limited significance in cases arising out of injuries to a member of the Armed Forces on active duty.

The Fifth Circuit considered the indemnity issue as related to an injured serviceman in *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975). There a military serviceman sustained injuries at the hands of a surgeon and nurses of the United States Public Health Service. The district court had dismissed his suit against the surgeon and nurses as not sanctioned by the FTCA read in light of *Feres*. This ruling was not appealed by the serviceman. However, the serviceman also had brought a direct action against the malpractice insurer of the operating surgeon as permitted by Louisiana law. Lloyd's, the insurer, settled the case for $75,000, and sought contribution from the Government on the theory that the United States Public Health Service nurses assisted in the allegedly negligent treatment. Lloyd's contended that according to the Louisiana Civil Code, this made the nurses, and hence the United States, liable to Lloyd's as debtors "in solido." [10]

[10] LSA-Civil Code Article 2103 provides:

> When two or more debtors are liable in solido . . . [the obligation] should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation. [*Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159, 161 (1975).]

The meaning of the term "in solido," as used in the above statute, is found in Article 2091 of the Civil Code:

> There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each

The court determined that under Louisiana law no right to contribution existed because the United States could not be held liable to the serviceman in his own right and hence, could not be considered liable "in solido" with Lloyd's. The court considered its conclusion to be consistent with that reached by this circuit in *Maddux* v. *Cox, supra,* 511 F.2d at 163. It noted that the insurer had relied on the opinions in *Barr* v. *Brezina Construction Co., supra,* and *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), discussed *infra.* Although these decisions did not compel a determination favorable to the insurer, the court stated:

> We are in agreement with the expression in those opinions that *Feres* itself does not bar a third party suit against the United States for indemnity. [511 F.2d at 163.]

As in *Barr* v. *Brezina Construction Co., supra,* the court did not discuss whether the underlying rationale of *Feres* might preclude indemnity.

In *Wellington Transportation Co.* v. *United States, supra,* the Sixth Circuit held that a third party in a posture similar to that of Stencel may obtain indemnity. *Wellington* arose under admiralty law when a Coast Guard cutter and an automobile ferry, operated by Wellington Transportation Company, collided. A member of the Coast Guard in active service was injured and brought an action against Wellington to recover for his injuries. He failed in his claim but Wellington incurred substantial expense

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may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor. [511 F.2d at 161.]

in defending the action. Wellington thereafter brought an action against the United States for indemnity to obtain reimbursement of the attorney's fees and expenses incurred in successfully defending against the principal action.

The court rejected a contractual indemnity theory such as was recognized by the Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp., supra.* As an alternative, Wellington claimed entitlement to reimbursement under the theory of tort indemnity. The district court had denied the claim relying on *Feres.* The Sixth Circuit disagreed, reading *Feres* as "concerned only with an injured serviceman's direct remedy against the United States" and finding that "nothing in the Court's opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States." 418 F.2d at 111. The court then determined that the right to tort indemnity was properly allowable under federal maritime law. However, the court remanded for further proceedings since the record did not establish that appellant's attorney's fees had been incurred in defense of a liability based upon appellant's "passive," "constructive," "vicarious," or "insulated" fault, for which the Coast Guard was the "primary" or "active" wrongdoer. *Id.* at 112.

Obviously, *Wellington* offers support for Stencel's claim. However, its rationale conflicts with the other cases we have already discussed. The basis for potential recovery rested on simple "tort indemnity," devoid of any implied contractual or quasicontractual overtones. As our prior discussion indicates, this form of indemnity requires some form of tort liability to the injured person by the party sought to be charged as an indemnitor, and several cases, as previously discussed, hold that *Feres* precludes any such

tort liability on the part of the Government. *Wellington* does not mention this circuit's decision in *Maddux* v. *Cox, supra,* the two Ninth Circuit cases cited therein, or the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's* v. *United States, supra.* Although these four cases technically may have turned upon particular state law, in fact they looked to and construed the general common law followed by most states and which law also would usually apply in an admiralty setting. *Cf. Hess* v. *United States,* 361 U.S. 214 (1960). *Wellington* cannot be regarded as turning upon a contrary special rule. Thus, the rationale of the court is inconsistent with the cases we have previously discussed.

Nor does *Wellington* offer much guidance on the availability of a third-party military-related indemnity claim. The court states that the *Feres* holding is not a *per se* bar to such relief. However, it does not further discuss the issue. Perhaps the best explanation of *Wellington* is that the tort occurred on a navigable waterway under admiralty law and that the primary claim for indemnity was based upon a quasicontractual duty to indemnify which is liberally inferred in admiralty law. Such claims have been allowed by the Supreme Court in admiralty cases such as *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., Inc., supra,* and its progeny, and the Supreme Court's ambiguous disposition of *Treadwell Construction Co.* v. *United States, supra, see* note 9, *supra,* was taken by the *Wellington* court to require adherence to the *Ryan* rule. Certainly this view is supported language of the *Wellington* decision.

In any event, *Wellington* offers us no persuasive analysis of the relationship of the *Feres* rationale to the scope of the Government's waiver of immunity under the FTCA.

Unfortunately, this is equally true of the other circuit court opinions we have discussed, including our own in *Maddux* v. *Cox, supra.* No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman.

While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant cases. We cannot agree with Stencel that the general language of the FTCA was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concommitant obligations and liabilities imposed by the states upon private citizens. The involvement of the military relationship in this case distinguishes this case from those involving workmen's compensation acts such as the Longshoreman's Act considered in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.,* 315 U.S. 124 (1956), and its progeny, and the Federal Employees' Compensation Act considered in *Weyerhaeuser, supra,*[11] and in *Wallenius Bremen* v. *United States,* 409 F.2d 994 (4th Cir. 1969).

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[11] In *Weyerhaeuser S.S. Co.* v. *United States, supra,* the federal civilian employee's injuries occurred as the result of a collision between a private vessel and an Army dredge. Both vessels were at fault. The federal employee recovered against the private vessel which then successfully sought partial indemnity from the United States. The Court's reasoning in granting 50 percent indemnity is inapposite to the circumstances of the present case for the following reasons:

1) There is no good reason in normal circumstances for excusing a military vessel from obeying nationwide (and, to a large extent,

To allow Stencel to recover in this case would require us to "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States, supra,* 340 U.S. at 142. The FTCA neither permits nor compels us to effect such a "radical departure" from the established rule of law that federal military and contractual relationships are not to be governed by state law.[12] Therefore, the order of the district court dismissing Stencel's cross-claim is affirmed.

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worldwide) uniform maritime "rules of the road" when operating in navigable waters.

2) The action appeared to be directly authorized by the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.*, which " 'was intended to impose on the United States the same liability * * * as is imposed by admiralty law on the private shipowner * * *.' " 372 U.S. at 600.

3) The Government's liability for half the damages was based upon "a rule of admiralty law which, for more than 100 years, has governed with * * * clarity the correlative rights and duties of two shipowners whose vessels [were] both at fault." *Id.* at 603. This rule was well known to Congress when the Public Vessels Act was adopted.

4) The Federal Employees' Compensation Act expressly provided for recapture by the United States of FECA benefits paid to the employee, thus avoiding any possibility of a double recovery. *Id.* at 598 n.2.

We note that the Supreme Court has now modified admiralty's rigid equal division of damages rule, continuing the strong current trend toward apportionment of damages according to the relative fault of the parties. *See United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 406-07 (1975). However, this does not affect our analysis of the indemnity aspect of *Weyerhaeuser.*

[12] Stencel emphasizes the unfairness of requiring it to risk bearing the entire burden of liability for injuries for which it may have been partially, secondarily, or passively responsible. It observes that indemnity and contribution are equitable remedies evolved by the courts to ameliorate this injustice, either by distributing the loss equally through contribution or by shifting the enire burden onto the party primarily responsible through indemnity. *See* Prosser, *Law of Torts,* 3d Ed. §278. There is some force to this argument.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In *Feres,* the Supreme Court reasoned that the simple, certain, and uniform system of military compensation to injured servicemen was intended to stand in lieu of governmental tort liability in cases where the Government might be considered at fault. We note that the District of Columbia Circuit has adopted a novel approach in response to a similar "unfairness" argument in an action for contribution. That court held that the position of a beneficiary of such a compensation scheme is analogous to that of a plaintiff who has allowed one joint tortfeasor to have "bought his peace," and that the remaining defendant is entitled to have the damages reduced by half. *Murray* v. *United States,* 405 F.2d 1361, 1365 (D.C. Cir. 1968); *Martello* v. *Hawley,* 300 F.2d 721 (D.C. Cir. 1962); *see Dawson* v. *Contractors Corp.,* 467 F.2d 727 (D.C. Cir. 1972); *cf. United States* v. *Brown,* 348 U.S. 110, 111 n.1 (1954).

Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed November 15, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the Firm of Condon & Forsyth, hereby certify that I have this 20th day of December, 1976, served three copies of the foregoing Appendix upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at Rockefeller Center, New York, New York 10020 and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

.....

MICHAEL J. HOLLAND

Sworn to before me this
20th day of December, 1976

.....

LAWRENCE MENTZ
Notary Public

Supreme Court, U. S.
FILED
NOV 2 1976
MICHAEL RODAK, JR., CLERK

No. 76-321

In the Supreme Court of the United States

OCTOBER TERM, 1976

STENCEL AERO ENGINEERING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statutes involved 2

Statement 3

Argument 3

Conclusion 10

CITATIONS

Cases:

Barr v. *Brezina Construction Co.*, 464 F. 2d 1141, certiorari denied, 409 U.S. 1125 ..... 7, 8

Busey v. *Washington*, 225 F. Supp. 416 6

Certain Underwriters at Lloyd's v. *United States*, 511 F. 2d 159 ..... 7, 8

Cooper Stevedoring Co., Inc. v. *Kopke, Inc.*, 417 U.S. 106 6

Feres v. *United States*, 340 U.S. 135 ..... *passim*

Galimi v. *Jetco, Inc.*, 514 F. 2d 949 ..... 6, 8

General Dynamics Corp. v. *United States*, 535 F. 2d 489, petition for a writ of certiorari pending, No. 76-220 ..... 4, 7, 8

Howard v. *Wilson Concrete Co.*, 57 F.R.D. 8 7

Lewis v. *Amchem Products, Inc.*, 510 S. W. 2d 46 7

Page

Cases (continued):

Maddux v. *Cox*, 382 F. 2d 119 6

McDonnell Aircraft Corp. v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W. 2d 788 7

Murray v. *United States*, 405 F. 2d 1361 ..... 6, 8

Newport Air Park, Inc. v. *United States*, 419 F. 2d 342 ..... 6, 8

Sheridan v. *DiGiorgio*, 372 F. Supp. 1373, affirmed, 505 F. 2d 727, certiorari denied, 420 U.S. 990 6

Slattery v. *Marra Bros., Inc.*, 186 F. 2d 134, certiorari denied, 341 U.S. 915 6

States ex rel. Laclede Gas Co. v. *Godrey*, 468 S.W. 2d 693 7

Travelers Insurance Co. v. *United States*, 493 F. 2d 881 ..... 6, 8

Treadwell Construction Co. v. *United States*, 372 U.S. 772 9

United Air Lines, Inc. v. *Wiener*, 335 F. 2d 379, certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 ..... 6, 7, 8

United States v. *Brown*, 348 U.S. 110 5

Wallenius Bremen v. *United States*, 409 F. 2d 994, certiorari denied, 398 U.S. 958 8

Wellington Transportation Co. v. *United States*, 481 F. 2d 108 ..... 7, 8

Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597 ..... 7, 9

Statutes:

28 U.S.C. 1346(a) 6

28 U.S.C. 1346(b) 2, 4

28 U.S.C. 2674 ..... 2, 4

38 U.S.C. 301, *et seq.* 5

38 U.S.C. 401, *et seq.* 5

38 U.S.C. 601, *et seq.* 5

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v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-23a) is reported at 536 F. 2d 765. The order of the district court (Pet. App. 24a-27a) is reported at 395 F. Supp. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for third-party claims seeking indemnity for damages paid to servicemen injured or killed in activity incident to military service.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

STATEMENT

This case arose out of injuries sustained by an Air Force Reserve pilot in the performance of duties incident to military service. According to the complaint, Captain John Donham sustained permanent injuries while assigned for training to the 131st Tactical Fighter Group, Missouri National Guard, when he was forced to use his egress life-support system to eject from an F-100D fighter aircraft.

On October 11, 1974, Captain Donham filed a complaint in the United States District Court for the Eastern District of Missouri against petitioner, the United States, and others for injuries generated by "negligence and carelessness" resulting in the alleged malfunctioning of the aircraft egress life-support system. Captain Donham alleged in this complaint that the accident arose out of his military service duties. Subsequently, petitioner filed a cross-claim for indemnity against the United States alleging that the egress system was manufactured according to government specifications and was at all times after the manufacture in the custody or control of the United States.

The United States moved for summary judgment against Captain Donham's claim and also moved to dismiss petitioner's cross-claim, on the ground that recovery against the United States on either claim was precluded by *Feres* v. *United States*, 340 U.S. 135. The district court granted both motions (Pet. App. 24a-27a), and the court of appeals affirmed (Pet. App. 4a-23a).

ARGUMENT

1. Petitioner contends that it may seek indemnity against the United States for any damages for which it may be liable on account of the injuries to Captain

Donham, even though, under *Feres* v. *United States*, 340 U.S. 135, the United States is not directly liable to the serviceman. The court of appeals correctly rejected this contention. The court's judgment affirming the dismissal of petitioner's third-party complaint is supported by two alternative rationales: (a) that the Federal Tort Claims Act does not permit suits for indemnity by third parties who are liable to servicemen for injuries occurring while on active duty; and (b) that common law principles preclude indemnity under a tort theory in situations where, as here, the indemnitor is not directly liable to the injured party. See also the government's brief in opposition in *General Dynamics Corp.* v. *United States*, No. 76-220.[1]

a. Petitioner rests its claim against the United States upon the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674. But in *Feres* v. *United States*, 340 U.S. 135, the Court determined that the Act, which provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *," does not permit suits against the United States alleging liability in tort for the injury or death of a serviceman engaged in his duty. The Court pointed out that whereas the Act provides that "the law of the place where the act or omission * * * occurred" shall govern the United States' liability under the Act, the "relationship between the Government and members of its armed forces is 'distinctively federal in character' * * * " (340 U.S. at 143). The Court therefore concluded that the Act did not create a "new cause of action dependent on local law for service-

[1]A copy of the government's brief in opposition in *General Dynamics* is being furnished to petitioner's counsel.

connected injuries or death due to negligence" (340 U.S. at 146).

Though *Feres* involved a claim brought directly against the United States on behalf of a serviceman, the court of appeals correctly concluded that the same analysis is also appropriate in the context of tort indemnity claims. Imposition of liability for such claims, like imposition of direct liability, would subject the relationship between the United States and its military personnel to the idiosyncracies of state tort law, a result that would be incompatible with the Court's conclusion in *Feres* that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at, 143-144). Moreover, tort indemnity would involve the military in tort litigation disruptive of discipline and the orderly conduct of military affairs. As the Court explained in *United States* v. *Brown*, 348 U.S. 110, 112:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.[2]

b. Furthermore, common law principles preclude indemnity or contribution under a tort theory because the

[2]The imposition of indirect liability also would upset the balance struck by Congress in the veterans' compensation statutes between public responsibility for injuries to servicemen and the enormous potential liability arising from the dangers of military service. See 38 U.S.C. 301, *et seq.*, 401, *et seq.*, and 601, *et seq.*

United States is not directly liable for the injuries incurred by plaintiffs. See *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 403 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (and cases therein cited); *Maddux* v. *Cox*, 382 F. 2d 119, 124 (C.A. 8); *Newport Air Park, Inc.* v. *United States*, 419 F. 2d 342 (C.A. 1); *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949 (C.A. 2); *Travelers Insurance Co.* v. *United States*, 493 F. 2d 881 (C.A. 3). As the Ninth Circuit explained in *United Air Lines, Inc.* v. *Wiener, supra*, 335 F. 2d at 403: "The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity."[3] Claims against the United States for indemnity based upon the breach of an express or implied agreement are not assertable under the Tort Claims Act. See *Travelers Insurance Co.* v. *United States, supra; Murray* v. *United States*, 405 F. 2d 1361 (C.A. D.C.); cf. 28 U.S.C. 1346(a)(2). And the United States is not directly liable to the injured party here. *Feres* v. *United States, supra.* Accordingly, even if the Federal Tort Claims Act did permit an indemnity

[3]This doctrine prevents the frustration of statutorily restricted liability schemes by limiting the financial exposure of government to the statutory liability to which it has acceded. See *Cooper Stevedoring Co., Inc.* v. *Kopke, Inc.*, 417 U.S. 106, 115; *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915; *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373 (E.D. N.Y.), affirmed, 505 F. 2d 727 (C.A. 2), certiorari denied, 420 U.S. 990; *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D. D.C.). It also insures that, in a commercial context, subsequent court action will not undermine the allocation of risks explicit or implicit in the contractual undertaking.

claim for service-connected injuries, the substantive common law would preclude recovery by petitioner.[4]

2. Contrary to petitioner's contention (Pet. 9-11), the decision of the court of appeals does not conflict with the decisions in other circuits that have addressed the issue whether the United States is liable under the Act for third-party claims seeking indemnity in the military context. See *General Dynamics Corp.* v. *United States*, 535 F. 2d 489 (C.A. 9), petition for a writ of certiorari pending, No. 76-220; *United Air Lines, Inc.* v. *Wiener, supra; Barr* v. *Brezina Construction Co.*, 464 F. 2d 1141 (C.A. 10), certiorari denied, 409 U.S. 1125; *Certain Underwriters at Lloyd's* v. *United States*, 511 F. 2d 159 (C.A. 5).[5] While these courts have not adopted

[4]Contrary to petitioner's assertion (Pet. 2-3), the pertinent Missouri cases are consistent with the general common law. Under Missouri law, in the absence of a contractual undertaking between the third-party plaintiff and a third-party defendant-employee such as the United States, whose responsibility to its employees is defined by compensation laws, there is no indemnity: the employer "owed no further duty in tort for which it could be liable to either [the injured employee] or * * * third party plaintiffs," *Howard* v. *Wilson Concrete Co.*, 57 F.R.D. 8, 11 (W.D. Mo.). See *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W. 2d 788 (Mo. Sup. Ct.); *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W. 2d 693 (Mo. Ct. App.). See also *Lewis* v. *Amchem Products, Inc.*, 510 S.W. 2d 46 (Mo. Ct. App.).

[5]*Wellington Transportation Co.* v. *United States*, 481 F. 2d 108 (C.A. 6), also discussed by petitioner (Pet. 11-12), is inapposite. The claim in *Wellington* was brought under the Public Vessels Act, which, this Court has stated (*Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600), "was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner * * *." The indemnity claim there was for attorneys' fees, and the Sixth Circuit held simply that *Feres* would not bar the long-standing right to attorneys' fees "that under federal maritime law * * * are consistently awarded * * * *" (481 F. 2d at 111). The court remanded the case for

harmonious rationales, each has precluded tort indemnity recovery against the United States.

In *United Air Lines, Inc.* v. *Wiener, supra,* which was reaffirmed in *General Dynamics Corp.* v. *United States, supra,* the Ninth Circuit rejected a third-party claim for indemnity arising from servicemen's injuries "for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arose out of or are in the course of activity incident to service" (335 F. 2d at 404). In the other cases, *Barr* v. *Brezina Construction Co., supra,* and *Certain Underwriters at Lloyd's* v. *United States, supra,* the court of appeals stated that the *Feres* holding did not itself prohibit third-party indemnity claims against the United States.[6] However, the courts in both cases found that, on the facts before them, the common law or statutory requirements for indemnity could not be met. Thus, no court of appeals has held the United States liable for the kind of indemnity that petitioner seeks here.

3. Petitioner also contends (Pet. 5-8, 9-12) that the decision here is in conflict with cases in other circuits,[7]

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further findings concerning the nature of appellant's fault. Neither the Public Vessels Act nor a long-standing right to indemnity is involved in this case, and, thus, the decision in *Wellington* does not conflict with the decision here.

[6]At the same time, neither court gave explicit consideration to whether the rationales underlying the decision in *Feres* are applicable in a third-party contest (see Pet. App. 15a-18a).

[7]*E.g., Murray* v. *United States,* 405 F. 2d 1361 (C.A. D.C.); *Wallenius Bremen* v. *United States,* 409 F. 2d 994 (C.A. 4), certiorari denied, 398 U.S. 958; *Newport Air Park, Inc.* v. *United States, supra; Galimi* v. *Jetco Inc., supra; Travelers Insurance Co.* v. *United States, supra.*

and in this Court,[8] concerning injuries to non-military government employees. But the holdings in these cases are inapposite to the issue here since they do not implicate the rationales, which are peculiarly applicable in the military context, that the Court found dispositive in *Feres* and that the court of appeals correctly concluded were applicable here. For example, in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597, a suit brought under the Public Vessels Act, this Court held that the Federal Employees Compensation Act ("FECA") did not have the effect of eliminating an otherwise existing third-party right of action. Unlike the present case, *Weyerhaeuser* concerned no new tort remedy, but rather "a rule of admiralty law which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (372 U.S. at 603). "[T]he single question [in *Weyerhaeuser* was] whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600).[9] The principle established in *Weyerhaeuser* is that the FECA was not intended to affect third-party rights under settled doctrines of admiralty law. That principle has no bearing on this case, in

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[8]*Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597; *Treadwell Construction Co.* v. *United States,* 372 U.S. 772.

[9]*Treadwell Construction Co.* v. *United States, supra,* similarly concerned the question whether the FECA abrogated third-party remedies against the United States that might otherwise have been available to a joint tortfeasor. The Court, without deciding the issue, summarily vacated the court of appeals' judgment in favor of the United States and remanded the case for further consideration in light of the intervening decision in *Weyerhaeuser.* See Pet. App. 17a, n. 9.

which the question is not whether a statute by implication extinguished liability for indemnity that already existed, but, conversely, whether a statute—the Federal Tort Claims Act—creates a liability for indemnity that did not exist before.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner Stencel Aero Engineering Corporation, submits this Reply Brief pursuant to Supreme Court Rule 24(4) in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. This Brief is submitted because Respondent, the United States, in its discussion of prior decisions erroneously suggests that there is no conflict among the decisions of the United States Courts of Appeals.

The decision of the Eighth Circuit in this case held that *Feres* v. *United States*, 340 U.S. 135 (1950), bars a government contractor's third party claim for indemnity or contribution against the United States, where the plaintiff is

a military serviceman suing the government contractor. This is in direct conflict with the decision of the Sixth Circuit in *Wellington Tranportation Co.* v. *United States,* 481 F.2d 108, at 111 (6th Cir. 1973), which held that "the *Feres* decision does not bar third party indemnity claims against the United States arising out of suits by injured servicemen." In *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972), the Tenth Circuit held that while *Feres* bars the serviceman's direct remedy against the United States, "it does not follow that a defendant third party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which will apply to the serviceman, since his is an independent remedy based upon different considerations." 464 F.2d at 1143. The Respondent fails to address these direct conflicts concerning the breadth of the application of the *Feres* doctrine.

The Respondent also argues for the application of federal "common law principles", asserting that the decisions of the Circuits on the issue at bar are not in conflict, because they uniformly apply the "common law principle" that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there could be no recovery for indemnity. Brief of the United States in Opposition, p. 6.

The notion that this "common law principle" should be and has been applied with respect to suits against the United States, contrary to the Congressional mandate that state law should apply, does not find support in the cases cited by the Government. As shown in petitioner's original brief, such cases as *Certain Underwriters at Lloyds* v. *United States,* 511 F.2d 159 (5th Cir. 1975); *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972); *General Dynamics Corporation* v. *United States,* 535 F.2d 489 (9th Cir. 1976) hold that, pursuant to the Federal Tort Claims Act, state law should be applied to determine the liability of a third party-plaintiff against the United States as a third party defendant, whatever the status of the plaintiff is in relation to the United States.

Petitioner vigorously disputes the respondent's summary treatment of Missouri law in footnote 4, which asserts that Missouri law is in accordance with the common law rule urged by the Government. As Petitioner argued to the United States Court of Appeals for the Eighth Circuit, see Appendix to the Petition pp. 7a and 8a, the law in Missouri does not require liability of the indemnitor to the injured party. For example, in Missouri a third party plaintiff may recover indemnity from an employer for injuries sustained by an employee, despite the existence of a Workmen's Compensation statute that bars recovery by the employee against the employer. *State ex rel. Laclede Gas Co.* v. *Godfrey,* 468 S.W. 2d 693 (Mo. App. 1971); *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.,* 323 S.W. 2d 788 (Mo. 1959). Hence, Missouri does not adhere to the common law rule urged by the Government that in order to recover for indemnity or contribution against the third party defendant, there must be an underlying liability between the plaintiff and the third party defendant.

At this stage, however, the determination of the applicable state law is necessarily precluded, because the Eighth Circuit erroneously, it is submitted, held for the first time that Federal Tort Claims Act is inapplicable to such a claim for indemnity, merely because the use of state law would be inappropriate in these circumstances. This is, it is respectfully submitted, contrary to the Congressional mandate of the Federal Tort Claims Act that state law apply.

CONCLUSION

For the foregoing reasons stated in its original petition, it is stated that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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Dated: New York, New York
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Affidavit of Service

I, Michael J. Holland, being over the age of 18 years an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 10th day of November 1976, served three copies of the foregoing Reply Brief of Petitioner upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
10th day of November, 1976

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

Supreme Court, U. S.
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DEC 30 1976
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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	5
I. The Federal Tort Claims Act in Sweeping Language and With Few Exceptions Rendered the United States Liable for Its Tortious Acts to the Same Extent as a Private Person Would Be Liable Under the Law of the Place Where the Tortious Act Occurred	9
II. A Claim Against the United States for Indemnity to Recover Damages Caused by a Tortious Act of the United States, for Which a Private Individual May Be Held Liable to an Injured Party, Falls Within the Scope of the Federal Tort Claims Act	16
A. Petitioner Stencel's Claim Is a Tort Claim Based Upon an Implied-in-Law Contract of Indemnity Arising as the Result of the Government's Negligence in Its Dealings With Stencel	16
B. Petitioner's Claim Is Covered by the Broad Language of the Waiver in the FTCA and Is Not Excluded by Any of the FTCA's Exceptions	18

PAGE

C. There Is No Evidence That Congress Did Not Intend to Bring Claims for Indemnity Such As Petitioner's Within the FTCA. On the Contrary, There Is Evidence of Affirmative Congressional Intent to Include Such Claims 20

D. No Remedy Other Than That Provided by the FTCA Is Available to Compensate Petitioner for the Damages Which Result From the United States' Negligence to Petitioner 22

III. The Court Below in Rejecting Petitioner's Claim for Indemnity Against the United States, Because of a Finding That Such Claims Are Based on Relationships Which Make Application of State Law Inappropriate, Has Reached a Conclusion in Direct Conflict With the Clear Language and Purpose of the Federal Tort Claims Act That the United States Shall Be Liable to the Same Extent as a Private Individual Under Similar Circumstances 24

A. The Court Below Erred in Attempting to Extend Feres to This Case Because the Claim Rejected by This Court in Feres Bears No Relationship to Petitioner's Claim 25

B. The Application by the Court Below, of an "Appropriateness" Test Is Erroneous Because It Is Contrary to the Purpose, Language, and Nature of the Congress' Waiver of Sovereign Immunity in the FTCA 29

C. The Decision of the Court Below Is Contrary to Decisions of This Court and a Majority of the United States Court of Appeals 33

PAGE

CONCLUSION 37

Affidavit of Service 38

CITATIONS

Cases:

Barr v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972) 35
Brooks v. *United States*, 337 U.S. 49 (1949) 11

Certain Underwriters at Lloyd's v. *United States*, 511 F.2d 159 (5th Cir. 1975) 35

Drake v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962) 34

Feinstein v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970) 19
Feres v. *United States*, 340 U.S. 135 (1950) .....*passim*

General Dynamics Corp. v. *United States*, 535 F.2d 489 (9th Cir. 1976) 35

Kansas City Southern Ry. Co. v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960) 19

McDonnell Aircraft Corp. v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 (Mo. 1959) 19
Murray v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968) 35

Northwest Publications Inc. v. *United States*, 253 F.Supp. 829 (D.D.C. 1966) 17

PAGE

Rayonier, Inc. v. *United States*, 352 U.S. 315 (1957) 13, 14, 32

State ex rel. Laclede Gas Co. v. *Godfrey*, 468 S.W.2d 693 (Mo. App. 1971) 19

Treadwell Construction Co. v. *United States*, 372 U.S. 772 (1963) 8, 34

United States v. *Aetna Casualty and Surety Company*, 338 U.S. 366 (1949) 10, 14
United States v. *Brown*, 348 U.S. 110 (1954) 25
United States v. *Standard Oil Company of California*, 332 U.S. 301 (1947) 22, 29, 30
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) *passim*

Wallenius Breman G.m.b.H. v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 958 (1970) 36
Wellington Transportation Co. v. *United States*, 481 F.2d 108 (6th Cir. 1973) 36
Western Casualty & Surety Co. v. *Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967) 19
Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597 (1963) 33, 34

Statutes:

Court of Claims Act, 28 USC §1491 17

Federal Rules of Civil Procedure, Rule 54(b) 4

Federal Tort Claims Act, 28 USC §1346 .....2, 5, 9
28 USC §2674 ..... 2, 3
28 USC §2680 19

PAGE

Public Vessels Act, 46 USC §781 *et. seq.* 33

28 USC §1254(1) 1

Other Authorities:

H.R. 2285, 70th Cong. 1st Sess. (1929) 20

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (A. 36a) is reported at 536 F.2d 765. The opinion of the District Court (A. 32a) is reported at 395 F. Supp. 52.

Jurisdiction

The judgment of the Court of Appeals was entered June 4, 1976 (A. 7a, 36a). The petition was filed September 1, 1976 and was granted on November 15, 1976. (A. 56a). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Statute Involved

The statute involved is the Federal Tort Claims Act, (FTCA), 28 USC §1346(b) and §§2671-2680, the relevant provisions of which are:

28 USC §1346. UNITED STATES AS DEFENDANT

• • •

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • •

28 USC §2674. LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages,

measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Question Presented

Whether, pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, state law should be applied to determine the validity of a cause of action for indemnity brought against the United States by a private individual who ultimately may be held liable for personal injuries suffered by a government employee caused by the negligence of the United States?

Statement of the Case

On June 9, 1973, while on active duty for training with the Missouri Air National Guard, John Donham was injured in the process of ejecting from an F-100D Air Force aircraft over Missouri. (A. 9a-10a).

Donham then brought suit in the District Court for the Eastern District of Missouri against the United States, Stencel Aero Engineering Corporation (Stencel), petitioner herein, and others, claiming damages of $2,500,000. (A. 8a-11a). He claimed that his injuries were the result of a defect in the ejection system manufactured by Stencel and installed on the aircraft. Donham charged that the ejection system malfunctioned because of the "negligence and carelessness of the defendants (Stencel and the United States) individually and jointly". (A. 10a-11a).

Stencel then cross-claimed against the United States for indemnity asserting that if there was a defect in the ejection system it was due to the specifications, requirements and components provided by the United States. (A. 19a).

After issue was joined as to the complaint and the cross-claim and before any discovery was initiated, the United States moved for summary judgment against plaintiff Donham asserting that his injuries were sustained incident to his service and that *Feres* v. *United States,* 340 U.S. 135 (1950) barred the action. (A. 22a). The United States also moved to dismiss Stencel's cross-claim arguing that the existence of an exclusive system of compensation provided to Donham by the United States, as well as the decision in *Feres,* barred Stencel's action for indemnity against the United States. (A. 30a).

The District Court granted the motions of the United States and dismissed Donham's claim against the United States and Stencel's cross-claim for indemnity against the United States. (A. 32a-34a). The claim of Donham against Stencel, however, was not a part of the motion or decision of the District Court and remains pending against Stencel in the District Court.

The District Court held that *Feres* barred not only plaintiff Donham's claim against the United States, but also Stencel's cross-claim for indemnity against the United States because "to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly". (A. 33a).

The Order of the District Court was entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (A. 35a) and Stencel appealed to the United States Court of Appeals for the Eighth Circuit. Donham did not appeal.

The Court of Appeals affirmed the judgment of the District Court. The Court found that it was "inappropriate" to apply state law, as required by the FTCA, to a

claim involving the federal relationships existing between Donham and the United States and between Stencel and the United States, and concluded the Federal Tort Claims Act did not cover Stencel's claim for indemnity against the United States. (A. 36a-55a).

It is this decision of the Court of Appeals which is before the Court on this Petition.

Summary of Argument

In enacting the Federal Tort Claims Act (FTCA), the Congress in sweeping language waived the sovereign immunity of the United States from actions in tort and, with few exceptions, rendered the United States liable for its tortious acts to the same extent that a private person would be liable under the law of the place where the tortious acts occurred. 28 U.S.C. § 1346, §§ 2671-2680.

This case asks a single question: whether petitioner Stencel's claim is covered by the waiver of sovereign immunity contained in the FTCA.

In determining whether a claim is within the waiver of the FTCA, the Court has established as a basic rule of construction that the waiver is to be liberally construed and the exceptions to the waiver are to be narrowly construed. As its previous decisions disclose, this Court has followed a three-step process in determining whether a particular claim is covered by the waiver of the FTCA. First, the broad and sweeping language of the waiver is examined to determine whether the claim is within its terms; second, the listed exceptions to the FTCA are examined to determine if any apply to exclude the claim; third, the Court determines whether, in light of the broad waiver, there is any evidence that Congress did not intend to bring the claim within the purview of the FTCA.

In this process, this Court has also considered whether an FTCA remedy against the United States for the particular claim would fit within the existing system of remedies provided against the Government: if the claim is one for which Congress provided a remedy against the United States, it would be an indication that Congress did not intend the FTCA to cover the claim; if the claim is one for which there is no other remedy against the United States, the claim will be found covered by the FTCA, if within the language of the waiver.

Petitioner Stencel's claim in this case is a tort claim for indemnity against the United States based upon an implied-in-law contract of indemnity arising as a result of the negligence of the United States in its dealings with Stencel. When these considerations and this three-step process are applied to Stencel's claim, it is clear that Stencel's claim is covered by the waiver of sovereign immunity contained in the FTCA. The language of the Act is sufficiently broad to include Stencel's claim in indemnity for money damages based on the negligence of the United States in its dealings with Stencel. None of the thirteen listed exceptions apply to Stencel's claim. There is no evidence that Congress did not intend to include a claim for indemnity such as Stencel's within the coverage of the FTCA. In fact, there is evidence in the legislative history of an affirmative Congressional intent to include such a claim.

No other remedies against the United States are available to Stencel to redress damage suffered by Stencel as a result of the United States' negligent tortious conduct to it. If Stencel's claim is barred, Stencel will be left remediless against the United States.

Stencel's claim against the United States for indemnity therefore is clearly within the coverage of the FTCA.

The decision of the court below holding that the FTCA did not apply to petitioner Stencel's claim was based upon an "appropriateness" test contrary to the clear language and purpose of the FTCA that the United States shall be liable to the same extent as a private individual pursuant to applicable state law.

The court below found that, based upon the federal relationships between Donham and the United States and Stencel and the United States, it was inappropriate to apply state law as mandated by the FTCA and, therefore, that the FTCA does not apply to petitioner's claim.

The court below relied on and attempted to extend the decision in *Feres* v. *United States,* 340 U.S. 135 (1950). This Court's decision in *Feres* is irrelevant to Stencel's claim against the United States and has no applicability to the determination of whether the waiver in the FTCA covers petitioner's claim. None of the rationales that support the *Feres* decision would be furthered, even indirectly, by barring petitioner's claim. The *Feres* decision does not address the Stencel-United States relationship nor does it apply to the negligent acts of the United States committed against Stencel.

Donham's claim against Stencel is independent of Stencel's claim against the United States. His claim is fundamentally different and based on different sets of facts, legal theories, and acts of negligence. To extend *Feres* is to narrow the broad waiver of sovereign immunity contained in the FTCA, and broaden the *Feres* exception, contrary to this Court's basic rule of construction that the waiver be construed liberally, and the exceptions narrowly.

To ground the inapplicability of the FTCA upon the presence of federal relationships is to impose a limitation on the applicability of the FTCA which is contrary to the

plain language and purpose of the FTCA. Even if there were a basis for carving out a "federal relationship" exception, the concept of "federal relationship" is itself difficult, if not impossible, to define.

The FTCA, in its plain terms, provides a clear solution to the question of whether Stencel has a claim for indemnity against the United States under the Federal Tort Claims Act. The majority of the United States Courts of Appeals which have considered this question have found that the United States may be sued in tort indemnity and contribution according to applicable state law if a private person could be held so liable. More importantly, the Court in *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), in its brief but clear remand, held that, notwithstanding that the government employees was barred from suing the United States, a third-party could recover indemnity against the United States if provided by applicable state law.

The decision of the court below was therefore contrary to the clear language and purpose of the FTCA that the United States shall be liable to the same extent as a private person under similar circumstances according to applicable state law. This requires a reversal of the judgment of the Court below, remanding the cause with instructions that the motion of the United States to dismiss the cross-claim should be denied.

I.

The Federal Tort Claims Act in Sweeping Language and With Few Exceptions Rendered the United States Liable for Its Tortious Acts to the Same Extent as a Private Person Would Be Liable Under the Law of the Place Where the Tortious Act Occurred.

In enacting the Federal Tort Claims Act[1] (FTCA), the Congress, in sweeping language waived the sovereign immunity of the United States from actions in tort and, with few exceptions, rendered the United States liable for its tortious acts to the same extent as a private person would be liable under the law of the place where the tortious act occurred, 28 USC §1346, §§2671-2680. *United States* v. *Yellow Cab Co.,* 340 U.S. 543 (1951).

As the Court stated in *Yellow Cab*:

> "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions." Employers Fire Ins. Co. v. United States, (CA 9th Cal) 167 F2d 655, 657.

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[1] The Federal Tort Claims Act was Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842-47, Ch. 753, 28 U.S.C. (1946 Ed.) §921-946. Subsequently, in 1948, the Act was divided and reintegrated into Title 28 of the United States Code. Those changes, however, were not intended to alter the purpose, intent or substantive structure of the Act. For the purposes of evaluating the intent of Congress in waiving the Government's sovereign immunity, it is preferable to rely upon the original Act and petitioner will uniformly do so. See *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 547 n.4.

340 U.S. at 548 n.5. *See also United States* v. *Aetna Casualty and Surety Company,* 338 U.S. 367 (1949). The Court further explained in *Yellow Cab*:

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed." United States v. Shaw, 309 US 495, 501. . . .

340 U.S. at 554-55.

This holding emerged from a detailed study of past Congressional efforts to enact a bill waiving the Government's immunity in tort. Earlier bills were extremely particular and were designed to create and precisely delimit various causes of action which may be brought against the Government. As time went on, the bills became less and less specific, and in the early 1940's began to provide a broad waiver of sovereign immunity, with causes of action and defenses dependent on state law, with a few specific and listed exceptions. See *United States* v. *Yellow Cab Co.,* 340 U.S. 549-51 nn.6-8.

As a result of this development, the FTCA, as finally enacted in 1946, waived "the Government's immunity from suit in sweeping language". *United States* v. *Yellow Cab Co.,* 340 U.S. at 547. Consistent with the sweeping nature of the waiver, the Court concluded in *Yellow Cab* that the waiver should be liberally construed, and any exceptions to it should be narrowly construed.

Applying this rule of construction, the Court followed a three-step process for determining whether any particular claim is within the waiver of sovereign immunity:

(1) whether the claim is within the broad and sweeping language of the waiver;

(2) whether the claim is barred by any of the exceptions listed in the FTCA;

(3) whether, in light of the broad waiver, there is evidence that Congress did not intend to bring the particular claim within the purview of the FTCA.

In *Brooks* v. *United States,* 337 U.S. 49 (1949), this Court applied this three-step process in a suit by an off-duty serviceman for injuries sustained in an automobile accident with an army truck. The Court first looked to the terms of the waiver of sovereign immunity:

> The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen."

337 U.S. at 51.

Next the Court examined the exceptions to determine whether this claim was barred by the exceptions to the Act.

> None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war.

337 U.S. at 51.

Finally, the Court considered whether or not there was evidence that Congress did not intend to bring the particular claim within the purview of the Act.

> It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute

was passed. The overseas and combatant activities exceptions make this plain.

337 U.S. at 51.

In a case dealing with a claim for contribution under the FTCA, *United States* v. *Yellow Cab Co., supra,* this Court similarly followed this three-step process:

> The words "*any claim* against the United States . . . *on account* of personal injury" (emphasis supplied) are broad words in common usage. They are not words of art. Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed.

340 U.S. at 548.

Not only did the Court find no evidence that Congress did not intend to bring the claim within the Act, but in fact found evidence that Congress intended to bring the claim within the Act. See *United States* v. *Yellow Cab Co.,* 340 U.S. at 550 n. 8.

Feres v. *United States,* 340 U.S. 135 (1950), decided during the same term as *Yellow Cab* initially appears anomalous in its treatment of the FTCA and appears to create an exception to the Act. Closer examination reveals, however, that this Court found evidence that Congress did not intend to include within the purview of the Act claims of on-duty servicemen for service-connected injuries.

> The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefitted those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of

> military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

340 U.S. at 140. In addition to the finding that servicemen's claims were not within Congress' consideration, the Court found that the existence of this alternative remedy was persuasive evidence that the Congress had not intended to extend the FTCA remedy to on-duty servicemen.

Another example of the application of this three-step process is found in *Rayonier, Inc.* v. *United States,* 352 U.S. 315 (1957), where the Court found that the United States could be held liable under Washington law for negligent fire fighting. First the Court looked at the language of the Act and found the waiver broad enough to encompass these claims. 352 U.S. at 318.

Secondly, the Court examined the listed exceptions and determined them inapplicable. The Court stated:

> There is no justification for this court to read exemptions into the Act beyond those provided by Congress.

352 U.S. at 320.

The Court then found that there was no evidence that Congress intended to exclude the "novel and unprecedented governmental liability" of the United States for acts of Forest Service fire fighters. 352 U.S. at 319. The Court wrote:

> [T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

352 U.S. at 319

In all of these cases, the Court has also considered whether the claimant had a remedy against the United States alternative to the FTCA remedy. Where the claimant had no alternative remedy, the Court found that the claim was covered by the FTCA if it was within the language of the waiver. In *Rayonier,* for example, the Court noted that, absent the FTCA remedy, the claimant would be remediless. Said the Court:

> [W]hen the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair . . . .

352 U.S. at 320. *Yellow Cab* expresses a similar concern at 340 U.S. 551-552. See also *United States* v. *Aetna Casualty and Surety Co.,* 338 U.S. at 383.

On the other hand when the Court found that the claimant has another remedy against the Government, the Court found this to be an indication that Congress did not intend the FTCA to cover the claim. In *Feres* the Court said:

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.

340 U.S. at 139. The Court found that the serviceman's ample, quick and sure remedy made it unlikely that Congress intended to extend the FTCA remedy to him. Said the Court:

> If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy [The Military Compensation Act remedy and the FTCA remedy] to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

340 U.S. at 144.

Thus, these cases reveal that where a claimant has an alternative remedy, it is indicative of a lack of Congressional intent to provide an FTCA remedy for the claim. On the other hand, where the claimant has no alternative remedy against the United States the Court has accorded great weight to its basic rule of liberally construing the sweeping language of the waiver and has found coverage, refusing thereby "to read exemptions into the Act beyond those provided by Congress." 352 U.S. at 320.

The decisions of the Court provide the guidelines for interpreting the waiver of sovereign immunity contained in the FTCA. They enunciate the basic rule of construction that the sweeping terms of the waiver should be construed liberally and the exceptions should be construed narrowly; they disclose a three-step process for determining whether a particular claim is within the FTCA waiver; and finally, they reveal that in construing the waiver, the Court considers whether the claimant has any alternative remedy against the Government.

II.

A Claim Against the United States for Indemnity to Recover Damages Caused by a Tortious Act of the United States, for Which a Private Individual May Be Held Liable to an Injured Party, Falls Within the Scope of the Federal Tort Claims Act.

A. *Petitioner Stencel's Claim Is a Tort Claim Based Upon an Implied-in-Law Contract of Indemnity Arising as the Result of the Government's Negligence in Its Dealings With Stencel.*

Stencel's claim in this action is an indemnity claim to recover damages for which it may be held liable by reason of the negligence of the United States in its dealings with Stencel. Stencel claims that if it is held liable to the plaintiff, John Donham, for a defect in the ejection system it manufactured, that defect was inherent in the specifications, requirements and components negligently provided by the Government. (A. 19a). The negligence for which Stencel seeks indemnity is the United States' negligence in its dealings with Stencel.

There is no question that had Donham been a civilian (a non-U.S. serviceman or a non-government employee), Stencel could state a valid claim against the Government in indemnity to the extent permitted by applicable state law. Had Donham's plummeting egress system killed or injured a private citizen on the ground, Stencel likewise could state a claim for indemnity under the FTCA, if held liable to the injured citizen.

This case, therefore, is a straightforward claim against the United States for damages resulting from the Government's negligence in its dealings with Stencel.

The court below, in its opinion, attempted to characterize the Stencel-United States relationship as a contractual one governed by federal law. (A. 41a). The indemnity on which Stencel bases its claim is not contractual in nature; rather, it arises out of the United States' negligent provision of defective specifications, requirements, and components. Under Missouri law, it would be an implied-in-law contractual indemnity. That is: on the basis of this relationship, the law implies an obligation of the United States to indemnify Stencel when the character of the negligence of the United States was such as to create Stencel's liability to someone else.

While the doctrine has its roots in traditional notions of contracts for indemnity, it is, in fact, an equitable doctrine for adjusting tortious relationships. Despite its designation as an implied-in-law contract of indemnity, it is a tort doctrine dependent upon traditional notions of negligence. The Court of Claims, in administering the Court of Claims Act, 28 U.S.C. §1491, has long recognized the distinction between "implied-in-law" and "implied-in-fact" contracts. It has repeatedly held that its jurisdiction over contract claims includes "implied-in-fact" contracts but not those "implied-in-law". *Northwest Publications Inc.* v. *United States,* 253 F.Supp. 829 (D.D.C. 1966).

Therefore, petitioner Stencel's claim is a tort claim for money damages resulting from the negligence of the United States in providing defective specifications, requirements or components to Stencel. As a result of this negligence of the Government to Stencel, petitioner may be held liable to Donham. Stencel seeks indemnity from the Government for damages it may suffer as a result of the Government's negligence to it.

B. *Petitioner's Claim Is Covered by the Broad Language of the Waiver in the FTCA and Is Not Excluded by Any of the FTCA's Exceptions.*

The first step in the process of determining whether the Government's waiver of sovereign immunity covers Stencel's claim is to examine the FTCA's language of waiver. As this Court stated it in *Yellow Cab* printed here with the Court's original emphasis:

> The issue here is whether the Act also covers claims for contribution which would be due from the Government if the Government were a private individual.
>
> On its face the Act amply covers such consent. Section 410(a) waives immunity from suit on—"*any claim* against the United States, for money only, accruing on and after January 1, 1945, *on account of* damage to or loss of property or *on account of* personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, *the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except* that the United States shall not be liable for interest prior to judgment, or for punitive damages . . . ."

340 U.S. at 548.

The breadth of this language includes a claim for indemnity inasmuch as it does not require that the injury involved be the claimant's—only that the "United States,

if a private person," be liable to the claimant.[2] As was the case in *Yellow Cab,* the injuries here were to a third party to whom the claimant was or may be liable. Petitioner Stencel's indemnity claim clearly fits within the language of the waiver of sovereign immunity granted by Congress and is consistent with this Court's basic rule that the waiver be interpreted liberally.

The second step in the process is to determine whether the exceptions of the Tort Claims Act exclude petitioner's claim. None of the thirteen statutory exceptions to the Federal Tort Claims Act applies to petitioner's claim. 28 U.S.C. §2680. In holding that a claim of contribution is within the waiver contained in the Federal Tort Claims Act, this Court said: "Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed." 340 U.S. at 548. Similarly, none of thirteen present exceptions list or mention the other form of third-party tort claims: indemnity. The Court's basic rule that the exceptions of the FTCA be narrowly construed also supports the conclusion that none of the exceptions apply here. 340 U.S. at 548 n.5.

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[2] The law of Missouri would imply a contract of indemnity between the United States and Stencel under the facts of this case, as alleged in petitioner's cross-claim. See, *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City S. Ry.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v. *Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967). It is also clear that Missouri law does not require liability of the indemnitor to the injured party. *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W.2d 693 (Mo. App. 1971); *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 (Mo. 1959). However, the ruling of the court below mooted the question of what the state law was by deciding that state law was inapplicable.

C. *There Is No Evidence That Congress Did Not Intend to Bring Claims for Indemnity Such As Petitioner's Within the FTCA. On the Contrary, There Is Evidence of Affirmative Congressional Intent to Include Such Claims.*

The third step of the process is to determine whether there is evidence that Congress did not intend to bring the claim within the purview of the Act. There is no such evidence with regard to a claim for indemnity such as Stencel's. The absence of such evidence is sufficient to imply that Congress intended inclusion of Stencel's claim pursuant to application of this Court's basic rule of liberally construing the waiver.

Three pieces of evidence, however, indicate an *affirmative* intent to include claims similar to Stencel's within the FTCA. This evidence is drawn from the legislative history of the FTCA and, when taken together reveals that Stencel's claim falls clearly within Congress' intent. Generally, the legislative history of Congressional efforts to pass a tort claims act reveal an evolution from a particular to a general waiver. Most of the particular claims allowed in the early bills therefore must have been intended to fall within the more general waiver subsequently enacted.

In H.R. 2285, 70th Congress, 1st Session, which was passed by both the House and the Senate but suffered a pocket veto, the Congress sought to impose on the Government liability for personal injury:

> if caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his office or employment, or if attributable to any defect or insufficiency in the machinery or other materials due to any such negligence or wrongful omission.

H.R. Rep. No. 286, 70th Cong., 1st Sess. 5 (1929).

Congress clearly intended to cover personal injury resulting from the creation of defective machinery through the negligence of a government employee. Here, petitioner, in its cross-claim, contends that some government employee(s) were negligent in providing defective specifications, requirements, or components which created the defect for which Stencel may be held liable to Donham.

Thus Stencel's underlying claim was considered valid by Congress. The claim's validity is not affected by the fact that it is brought as an indemnity action for injuries to a third person. Stencel, in this respect, is a joint tortfeasor (albeit a passive one) with the United States. The second relevant passage from the legislative history was cited for its pertinence and quoted in *Yellow Cab*:

> "Section 403 of the Senate bill provided for a proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill *and in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law.*" [Emphasis supplied.] H.R. Rep. No. 2245, 77th Cong., 2nd Sess. 12.
>
> This recognizes that with the provision for proportionate liability eliminated, as is still the case, the immunity of the United States should be considered as waived in relation to the Government's rights and liabilities in cases involving joint tort-feasors.

340 U.S. at 551 n.8.

The third piece of evidence from the legislative history is of a more general nature. The various tort claim bills,

prior to the FTCA which was finally enacted, spoke in terms of waiving the Government's liability for acts of "negligence". The FTCA, as enacted, placed no such restriction on allowable tort claims. Rather, the Congress engrafted exceptions onto the Act which prohibited recoveries for acts performed with "due care" (Exception "a" in Section 421) or for the intentional torts (listed in Exception "h" of Section 421 of the original Act). It is clear that Congress had extensive knowledge of the law of torts and, therefore, it must be presumed that Congress intended that the Government be liable for all types of tort actions then in existence other than those specifically excepted. Tort indemnity, which was an established tort concept,[3] must, therefore, have been intended to be allowed.

Taken together, these three pieces of legislative history show that: (1) the gravamen of Stencel's claim was considered by the Congress and allowed; (2) the fact that the action is by a third-party joint (albeit passive) tortfeasor does not bar, nor affect the validity of, the underlying claim; and, (3) that tort indemnity must have been intended to have been included by Congress in its waiver.

D. *No Remedy Other Than That Provided by the FTCA Is Available to Compensate Petitioner for the Damages Which Result From the United States' Negligence to Petitioner.*

This Court's concern whether or not an alternative remedy is available to a claimant is important in this case. For example, in *Feres* v. *United States,* 340 U.S. 135 (1950), this Court found significant the fact that the serviceman was provided an ample, quick, and sure means of recovery

[3] In *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), this Court appeared to concur in the Government's contention that indemnity was "a well-settled concept of legal liability . . ." 332 U.S. at 315.

and that Congress' failure to adjust the Federal Tort Claims Act and the military compensation system must have meant that Congress did not intend the serviceman to have a Federal Tort Claims Act remedy. No such situation pertains in this case since no alternative remedy is provided to petitioner.

The Court of Claims Act does not provide a remedy to petitioner, as the United States Court of Claims has repeatedly interpreted the Court of Claims Act to exclude implied-in-law contracts of indemnity. No other statutes confer remedies for the Government conduct alleged in the case. Petitioner finds itself in virtually the same position faced by the joint tortfeasor of the Government in the *Yellow Cab* case. Petitioner believes that the following passage from that case is even more compelling where, as here, the petitioner is only a passive joint tortfeasor seeking indemnity. The Court stated with regard to contribution:

> Of course there is no immunity from suit by the Government to collect claims for contribution due it from its joint tortfeasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tortfeasor as a third-party defendant. See, 3 Moore's Federal Practice (2d Ed. 1948) 507 *et seq.* It is fair that this should work both ways. However, if the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government then could sue its joint tortfeasor for the latter's contributory share of the damages (local substantive law permitting). On the other hand, if the injured party recovered judgment against the private tortfeasor, it would mean that (despite local substantive law favoring contributory liability) that an individual could not sue the

> Government for the latter's contributory share of the same damages. Presumably, the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here.

340 U.S. at 551-52.

Thus, if Stencel's indemnity claim is barred, Stencel will be left without remedy or compensation for the United States' negligence. Petitioner's only recourse will be to seek the "grace" of Congress to compensate it for the loss it suffered as a result of the United States' negligence. It is difficult to believe that Congress intended such a result.

III.

The Court Below in Rejecting Petitioner's Claim for Indemnity Against the United States, Because of a Finding That Such Claims Are Based on Relationships Which Make Application of State Law Inappropriate, Has Reached a Conclusion in Direct Conflict With the Clear Language and Purpose of the Federal Tort Claims Act That the United States Shall Be Liable to the Same Extent as a Private Individual Under Similar Circumstances.

The decision of the court below erred in attempting to extend the *Feres* case to this case. Ignoring this Court's reasoning in interpreting the FTCA and applying its waiver of sovereign immunity, the court below created an "appropriateness" test for determining whether the FTCA applied to petitioner's claim. This test and the result reached by its application in the court below are in direct conflict with the mandate of the FTCA and the decisions of this and other courts.

A. *The Court Below Erred in Attempting to Extend Feres to This Case Because the Claim Rejected by This Court in Feres Bears No Relationship to Petitioner's Claim.*

This Court, in *Feres,* held that the United States is immune from suit by an on-duty serviceman based on injuries sustained incident to his service. The court below stated:

> In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.

536 F.2d 765 at 770 (A. 44a). This conclusion of the court below fundamentally mistakes both the petitioner's claim and the claims rejected in *Feres.* An examination of the rationales that support the *Feres* decision show that the claims asserted in that case bear no relationship to petitioner's claim.

The *Feres* case sets out a number of rationales in support of its decision. They are: (1) the unfairness that a serviceman's action should turn on the vagaries of state law over which he has no control since he is placed there by orders, 340 U.S. at 143; (2) the lack of time and money and the difficulty of procuring witnesses on the part of a serviceman in bringing a suit, 340 U.S. at 145; (3) the fact that the serviceman had an ample, quick and certain remedy in the form of the Military Compensation Act, 340 U.S. at 145; and (4) the effect of such suits on "military discipline." See, *United States* v. *Brown,* 348 U.S. 110, 112 (1954). It is clear that these rationales bear little relevance to either the Stencel-Donham or Stencel-United States relationships involved in this case.

Whatever unfairness there may be in having a serviceman's action depend on the vagaries of state law, it has no applicability to the Stencel-United States relationship. As a manufacturer of products, petitioner is resigned to having claims turn on the law of the various states into which its products flow. Certainly, the United States suffers no unfairness, for it chooses where its equipment is used. As the Court stated in *Feres*:

> That his tort claims should be governed by the law of the location where he has elected to be is just as fair when the defendant is the Government as when the defendant is a private individual.

340 U.S. at 143.

Most importantly, however, the terms of the FTCA itself subject the United States to the "vagaries" of state law.

Whatever difficulties the serviceman may have in bringing suit, no such problems attach to petitioner's claim. The *Feres* rationales are clearly not applicable to petitioner's claim as Stencel has no choice but to expend its resources in defense of Donham's action which remains pending in the District Court. For that matter, denying petitioner's claim does nothing to protect the serviceman's resources for he has already chosen to sue petitioner Stencel and that action will remain unaffected whatever the outcome here.

The fact that the serviceman has an ample, quick and certain remedy against the United States does not affect Stencel. Whatever the serviceman's remedy under the military compensation system, it is not available and provides no relief to Stencel. If petitioner's claim is denied, petitioner is left remediless against the party most responsible for the accident, the United States. If this rationale is meant to preserve the systemic integrity of the

compensation scheme, petitioner suggests that this system's integrity is skewed the moment the serviceman brings suit against petitioner or someone in a like position.

The military discipline rationale does not apply to petitioner's claim. Petitioner's claim does not in any way depend on the actions, inactions, or orders of Donham's commanding officers. To the extent that in similar third-party actions against the Government, such orders might be relevant in another case, two things should be understood. First, if those orders were the proximate cause of the serviceman's injury, a non-Government defendant would raise these matters as a defense to causation. Thus, even if the Government is immune from suit, the military discipline rationale would be disrupted when these matters are raised and explored in the course of defending against the serviceman's suit. Second, assuming the Government is not immune to a third-party's claims pursuant to the *Feres* exception, the Government would still be protected under the discretionary function exception. While petitioner's claim does not turn on any orders or action of Donham's superiors, in a case where the claim is based on such orders or actions, the discretionary function exception is designed to protect the Government's interest in such important decision-making.

None of the rationales that support that decision would be furthered, even indirectly, by extending the *Feres* decision to third-party suits for indemnity.

The Court below stated that to permit petitioner's claim would be to allow the serviceman to do indirectly what he is forbidden to do directly. This is an inaccurate statement of the case. Donham will proceed against Stencel in any case and must prove certain facts establishing liability on the part of Stencel. Any attempt by Donham to prove negligence on the part of the United States would be

irrelevant to his case. Stencel, on the other hand, in its indemnity claim, will seek to establish a different set of facts which would constitute negligence of the Government with regard to Stencel, which negligence caused Stencel's liability to Donham.

These are two separate causes of action, dependent on different sets of facts, different legal theories, different acts of negligence, and may be tried to different triers-of-fact. Thus, these two actions have a number of possible outcomes: (1) Donham could fail to prove any liability on the part of Stencel; (2) Donham could recover against Stencel on counts for which indemnity against the Government does not lie; (3) Donham could recover against Stencel, but Stencel might be unable to prove a set of facts which would give rise to indemnity; (4) Donham could recover against Stencel on the basis of its negligence to him, and Stencel could recover from the United States on the basis of its negligent conduct to Stencel. In only one of the four examples set out above would the United States even indirectly pay Donham's damages. In that example, the United States' liability would not be the result of Donham's proof in his action against Stencel, but as the result of what Stencel proves in its action against the United States.

The *Feres* decision therefore, is not applicable to this case and should not be extended to bar petitioner's claim. None of the rationales that underlie that decision have any bearing on the relationship between the United States and Stencel nor would they, in any way, be furthered by barring Stencel's claim. The claim of Donham against petitioner and petitioner's claim against the United States are independent causes of action dependent on different legal theories, acts of negligence, and sets of facts to be proven. This is not a mechanism intended to allow Donham to

recover from the Government. Rather, it is Stencel which seeks a remedy for damages caused by the Government's negligence to it. Donham's only relevance to this action is that payments to him may constitute an element of petitioner's damages. The Government's possible liability is irrelevant to Donham's claim against Stencel and Donham is irrelevant to Stencel's claim against the Government.

The extension of *Feres* would infringe the basic rule that the waiver of sovereign immunity must be liberally construed, especially where the claimant would be left remediless against The United States. If *Feres* be viewed as an exception to the broad waiver of sovereign immunity contained in the FTCA, it should not be extended to Stencel's claim since, as with all other exceptions to the FTCA, it must be narrowly construed.

B. *The Application by the Court Below, of an "Appropriateness" Test Is Erroneous Because It Is Contrary to the Purpose, Language, and Nature of the Congress' Waiver of Sovereign Immunity in the FTCA.*

The court below found in this Court's *Feres* decision a test for the applicability of the FTCA whether the application of state law would be appropriate. 536 F2d at 769 (A. 41a). The court found that, since the two relationships —serviceman-Government and Government-military contractor—were federal in nature, it would be *inappropriate* to apply state law. Therefore, the court below concluded, the FTCA does not cover Stencel's claim.

As support for its decision, the court below relied on language in *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947) which stated that the serviceman-Government relationship was federal in nature and should be governed by federal authority. In that case, the Government was

seeking indemnity from a private third-party for medical expenses paid by the United States to a serviceman whom the third-party had negligently injured. The government's position was that a federal rule of indemnity should be applied. In rejecting the Government's position, this Court's essential holding was that Congress has the power to create causes of action and to assign the law applicable to them. In its concluding paragraph this Court stated:

> [T]he United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.

332 U.S. at 316-317.

The *Standard Oil* case was decided before the effective date of the FTCA. Through the FTCA, Congress exercised its power and established the liability of the United States to causes of action in tort. Congress also mandated that the extent of the Government's liability shall be determined in accordance with state law, and further specified which state law would be applicable.[4] The thrust of the *Standard Oil* decision was that Congress, and only Congress, had this power. The corollary of the *Standard Oil* decision in this

[4] There is no doubt that the Act commands the application of state law. Even the court below agreed that:

> Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b)

536 F.2d at 769. (A. 41a).

case is that once Congress explicitly exercises its Constitutionally mandated power, the exercise must be honored by the courts. This the court below refused to do and was seriously in error in departing from the express command of Congress.

In this respect, the *Feres* decision did not hold that the FTCA does not cover an on-duty serviceman's claim against the United States *because* it would necessitate application of state law. As discussed above, the Court's decision in *Feres* was predicated on the conclusion that Congress did not intend that on-duty servicemen would be within the purview of the FTCA. This Court merely viewed the application of state law as an anomalous side effect of holding the FTCA applicable to claims of on-duty servicemen against the Government. Said the Court:

> It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.

340 U.S. at 143.

Yet, the Court below has turned this anomalous side effect into a test for determining the applicability of the Federal Tort Claims Act. The Court below said:

> Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state

law apply to situations arising out of these two relationships.

536 F.2d at 769 (A. 41a).

Finding these relationships to be "governed exclusively by federal law", the court below found that Congress did not intend to permit this type of indemnity claim under the FTCA.

The irony of this "appropriateness test" is that many cases—specifically United States-Government contractor cases sounding in tort—involve the "federal relationship" found in this case. What is to constitute a federal relationship in other cases will be less clear. Yet the conclusion of the court below is that the presence of a federal relationship bars applicability of the FTCA is in clear contradiction to the holding in the *Rayonier:*

> [T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

352 U.S. at 319.

Given that every suit under the Federal Tort Claims Act involves novel and unprecedented liability and many suits involve a federal relationship, where does the "appropriateness" test leave claimants? Must a claimant prove that his relationship to the Government is not a federal relationship? Are federal relationships and non-federal relationships to be added up and balanced, and the FTCA to be held inapplicable where there are more of the former than the latter?

If an Army truck had negligently collided with one of petitioner's trucks while the latter was delivering spare parts to an Army base pursuant to a Government contract, would not the "federal relationship" be the same as the one in the case at bar? Doesn't the appropriateness test lead to the conclusion that the Government can commit torts against government contractors with immunity? Is this what Congress intended?

Petitioner's position is both simple and consistent with the clear language of the FTCA. To the tortious relationship between Stencel and the United States state law must be applied pursuant to Congressional command in the FTCA. Under the "appropriateness" test, the alternative is to leave Stencel and others similarly situated, remediless and uncompensated for the negligence of the United States to them.

C. *The Decision of the Court Below Is Contrary to Decisions of This Court and a Majority of the United States Court of Appeals.*

This Court's decision in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963), held that the Federal Employees Compensation Act's (FECA) exclusive liability provision did not bar recoveries against the United States by third persons held liable for injuries to government employees. The FECA's exclusive liability provision has the same legal effect on direct suits by Government employees against the Government as does the *Feres* decision on direct actions by servicemen. Both remove the Government's liability to its employees (civilian and military).

In the *Weyerhaeuser* case, the Court decided to uphold a one hundred year old divided damages rule against the Government pursuant to the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.,* which the Court stated:

"was intended to impose on the United States the same liability . . . as is imposed by admiralty law on the private shipowner. . . ." [citation omitted].

372 U.S. at 600. The Court held that the exclusive liability provision had no effect because the hundred-year-old damages rule did not require underlying liability of the United States to the injured employee. The *Weyerhaeuser* decision is closely analogous to the present case. Here the Government's sovereign immunity was waived by the FTCA intending to make the liability of the United States the same as the applicable state law would impose on a private individual. As it happens, Missouri law does not require underlying liability of the United States to its employee as a prerequisite to the recovery of indemnity. Hence the effect of *Feres* (removing the underlying liability) should be no greater than the effect of the FECA exclusive liability provision and recovery should be allowed here as it was there.

That the Court intended application of this reasoning in cases involving state law pursuant to the FTCA is clear from this Court's decision during the same term in *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). *Treadwell* was a non-admiralty case where a third-party sought indemnity from the United States pursuant to the FTCA for injuries suffered by a Government employee. Since the decision of the Third Circuit, *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962), was predicated on the inapplicability of the FTCA by virtue of the exclusive remedy provision of the FECA, the Court, vacating and remanding, in light of *Weyerhaeuser*, must have intended the application of state law pursuant to the FTCA.

The United States Courts of Appeal for the Fifth, Ninth, Tenth, and D.C. Circuits[5] have all looked to state law to determine whether claims for contribution or indemnity should be allowed despite the absence of the United States' underlying liability to its employees. While the Courts in each of these cases rejected the indemnity and contribution claims, they all did so on the basis of *state* law.

In these four cases, the legal theory applied by the four Circuits was both logical and simple. The actions for indemnity and contribution were brought pursuant to the Federal Tort Claims Act. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). Neither the FECA exclusive liability provision nor *Feres* barred such claims at the threshold. The courts then looked to the applicable state law to determine whether, under like circumstances, contribution or indemnity would lie against a private person. If, but only if, the state law (as found or predicted) required underlying liability of the indemnitor to the injured party as a prerequisite to indemnity or contribution would the claim be barred. These courts looked to FECA or *Feres* only to determine that there is no underlying liability of the United States to its injured employees. Where state law does not require underlying liability, the claim for indemnity or contribution must lie against the United States.

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[5] The decisions are: *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975); *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968); *General Dynamics Corp.* v. *United States*, 535 F.2d 489 (9th Cir. 1976). Discussion of these cases can be found in the Petition at pp. 9-11.

Two other Circuits[6] have announced similar results in analogous cases. These two cases involved indemnity claims brought pursuant to the FTCA and Suits in Admiralty Act. The Sixth Circuit held that *Feres* did not bar third-party indemnity claims against the United States arising out of suits by injured servicemen. The Fourth Circuit rejected the applicability of the FECA exclusive liability provision as a bar to such indemnity claims by third persons. The claims were ultimately decided on the basis of applicable admiralty law.

Thus the decision of this Court and a majority of the United States Courts of Appeal have held that the FTCA applies to third-party claims for indemnity and contribution against the Government arising out of injuries to Government employees. The clear weight of decisional authority supports petitioner's conclusion that its indemnity claim against the Government is properly brought pursuant to the FTCA.

These decisions recognize the exercise of Congressional will that the Government may be sued in indemnity and contribution. They honor the Congressional command to apply state law. They follow the traditional rules of construction and the approach taken in the earliest decisions of this Court interpreting the FTCA that the waiver of sovereign immunity is to be liberally construed.

Petitioner urges that the approach taken by the court below is contrary to these principles and these decisions, and that the decision of the court below should therefore be reversed.

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[6] The decisions are: *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (6th Cir. 1973); *Wallenius Breman G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969) *cert. denied*, 398 U.S. 958 (1970). Discussion of these cases can be found in the Petition at pp. 11-12.

CONCLUSION

The judgment of the court below should be reversed and the cause remanded with instructions to deny the motion of the United States to dismiss the cross-claim of petitioner for indemnity against the United States.

Respectfully submitted,

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December 30, 1976

Affidavit of Service

I, Thomas J. Whalen, being over the age of 18 years, a member of the firm of Condon & Forsyth, hereby certify that I have this 30th day of December, 1976, served three copies of the foregoing Petitioner's Brief upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

.....

THOMAS J. WHALEN

Sworn to before me this
30th day of December, 1976.

.....

Notary Public

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No. 76-321

In the Supreme Court of the United States

OCTOBER TERM, 1976

STENCEL AERO ENGINEERING CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	5
Argument	9
The United States is not liable under the Federal Tort Claims Act for third-party claims for indemnity for damages paid to servicemen injured in activity incident to military service	9
A. The Tort Claims Act does not waive sovereign immunity to such claims for indemnity	9
1. Petitioner's theory of the government's liability is essentially the same as would be advanced by the injured serviceman if his action were not barred	10
2. The reasons for barring the serviceman's action apply equally to petitioner's suit for indemnity	14

Argument—Continued Page

a. Permitting the serviceman's action would be inconsistent with the statutory compensation scheme for military personnel, would disrupt military discipline, and would be inappropriate in view of the distinctively federal character of the military 14

b. Similar considerations pertain here and preclude subjecting the United States to liability as indemnitor where it would not be liable to the serviceman 18

i. Indemnification would frustrate the limited-liability function of the veterans' compensation scheme 19

ii. Third-party indemnity claims would have the same adverse effects on military discipline as claims brought directly by the injured serviceman 24

iii. A Tort Claims Act remedy by way of indemnity would place state law restraints on federal military actions 27

iv. The allowance of noncontractual indemnity is not required by equitable considerations 30

Argument—Continued Page

B. If sovereign immunity has been waived, nevertheless federal indemnity doctrines govern here, and they preclude recovery where the United States lacks direct liability to the injured person 34

Conclusion 40

CITATIONS

Cases:

Adams v. *General Dynamics Corp.*, 535 F.2d 489, petition for a writ of certiorari pending *sub nom. General Dynamics Corp.* v. *United States*, No. 76-220 .. 28-29

Barr v. *Brezina Construction Co.*, 464 F. 2d 1141, certiorari denied, 409 U.S. 1125 30

Brooks v. *United States*, 337 U.S. 49 ..... 6, 15, 16, 19, 20

Busey v. *Washington*, 225 F. Supp. 416 .. 22

Certain Underwriters at Lloyd's v. *United States*, 511 F.2d 159 29

Coletta v. *United States*, 300 F. Supp. 19 11

Cooper Stevedoring Co., Inc. v. *Kopke, Inc.*, 417 U.S. 106 22

Dalehite v. *United States*, 346 U.S. 15 26

Davis v. *Henderlong Lumber Company*, 221 F. Supp. 129 30

Dolphin Gardens, Inc. v. *United States*, 243 F. Supp. 824 30

Feres v. *United States*, 340 U.S. 135 ..... *passim*

Galimi v. *Jetco, Inc.*, 514 F.2d 949 ..... 7-8, 22, 36, 38

Cases—Continued — Page

Greer v. *Spock*, 424 U.S. 828 24
Grimley, In re, 137 U.S. 147 24
Henninger v. *United States*, 473 F.2d 814, certiorari denied, 414 U.S. 819 ..... 24, 25
Herreman v. *United States*, 476 F.2d 234 11
Howard v. *Wilson Concrete Co.*, 57 F.R.D. 8 37
Indian Towing Co. v. *United States*, 350 U.S. 61 18
Kudelka v. *American Hoist & Derrick Co.*, 541 F.2d 651 38
Laird v. *Nelms*, 406 U.S. 797 ..... 23, 32
Layne v. *United States*, 295 F.2d 433, certiorari denied, 368 U.S. 990 11
Lewis v. *Amchem Products, Inc.*, 510 S.W.2d 46 ..... 36, 37
Littlehale v. *E. I. duPont de Nemours & Co.*, 268 F. Supp. 791, affirmed, 380 F.2d 274 30
McDonnell Aircraft Corp. v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 36
Merritt, Chapman & Scott Corp. v. *Guy F. Atkinson Co.*, 295 F.2d 14 30
Middendorf v. *Henry*, 425 U.S. 25 24
Moyer v. *Martin Marietta Corp.*, 481 F. 2d 585 26
Murray v. *United States*, 405 F.2d 1361 ..... 12, 38
Myers v. *United States*, 323 F.2d 580 30
Newport Air Park, Inc. v. *United States*, 419 F.2d 342 ..... 7, 35, 38
Orloff v. *Willoughby*, 345 U.S. 83 24
Parker v. *Levy*, 417 U.S. 733 24

Cases—Continued — Page

Peluso v. *United States*, 474 F.2d 605 11
Person v. *Cauldwell-Wingate Co.*, 187 F. 2d 832, certiorari denied, 341 U.S. 936 30
Rayonier, Inc. v. *United States*, 352 U.S. 315 31
Ryan Co. v. *Pan-Atlantic Corp.*, 350 U.S. 124 38
Sheridan v. *DiGiorgio*, 372 F. Supp. 1373, affirmed, 505 F.2d 727, certiorari denied *sub nom. DiGiorgio* v. *United States*, 420 U.S. 990 ..... 22, 35, 38
Slattery v. *Marra Bros., Inc.*, 186 F.2d 134, certiorari denied, 341 U.S. 915 ..... 22, 38
State v. *McLaughlin*, 315 S.W.2d 499 37
State ex rel. Laclede Gas Co. v. *Godfrey*, 468 S.W.2d 693 36
Travellers Insurance Co. v. *United States*, 493 F.2d 881 ..... 12, 35-36, 38
Treadwell Construction Co. v. *United States*, 372 U.S. 772 37
United Air Lines, Inc. v. *Wiener*, 335 F. 2d 379, certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 ..... 8, 28, 37
United States v. *Brown*, 348 U.S. 110 ..... 17, 20
United States v. *Carroll*, 369 F.2d 618 11
United States v. *Demko*, 385 U.S. 149 20
United States v. *Gilman*, 347 U.S. 507 33
United States v. *Muniz*, 374 U.S. 150 19
United States v. *Seckinger*, 397 U.S. 203 35
United States v. *Standard Oil Co.*, 332 U.S. 301 ..... 7, 28, 33
United States v. *Yellow Cab Co.*, 340 U.S. 543 ..... 10, 15, 31, 36

Cases—Continued

	Page
Wallenius Bremen G.m.b.H. v. *United States*, 409 F.2d 994, certiorari denied, 398 U.S. 958	38
Wellington Transportation Company v. *United States*, 481 F.2d 108	29
Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597	29

Statutes, rules and regulation:

Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781	29
10 U.S.C. 8062	10
10 U.S.C. 8077	10
28 U.S.C. 1346(a)(2)	12
28 U.S.C. 1346(b)	2
28 U.S.C. 2674	2-3, 17
28 U.S.C. 2680(a)	26
32 U.S.C. 104	10
32 U.S.C. 110	10
32 U.S.C. 318	3, 11
32 U.S.C. 319	11
32 U.S.C. 320	11
32 U.S.C. 321	11
32 U.S.C. 502	10
38 U.S.C. 301 *et seq.*	15
38 U.S.C. 401 *et seq.*	15
38 U.S.C. 601 *et seq.*	15
Federal Rules of Civil Procedure:	
Rule 33	26
Rule 45	26
Air Force Regulations No. 23-9, 12 February 1968	11

Miscellaneous:

	Page
Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 Mo. L. Rev. 307 (1963)	37
Davis, *Indemnity Between Negligent Tortfeasors; A Proposed Rationale*, 37 Ia. L. Rev. 517 (1952)	34
Hearings on H.R. 5723 before the House Committee on Interstate and Foreign Commerce, 65th Cong., 1st Sess. (1917)	21
Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932)	34
S. Rep. No. 1584, 80th Cong., 2d Sess. (1948)	21

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OPINIONS BELOW

The opinion of the court of appeals (A. 36a-55a) is reported at 536 F.2d 765. The memorandum of the district court (A. 32a-34a) is reported at 395 F. Supp. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976, and was granted on November 15, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act to indemnify a third party for damages paid to servicemen injured in activity incident to military service.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

STATEMENT

This case arose out of injuries sustained by an Air Force Reserve pilot in the performance of duties incident to military service. The pilot, who received statutory compensation from the United States pursuant to 32 U.S.C. 318 (A. 23a-25a), sought additional compensation from petitioner Stencel Aero Engineering Corporation for alleged negligence in connection with his injuries. In turn, petitioner seeks indemnity from the United States for any amount for which it may be held liable.

On October 11, 1974, Captain John Donham filed a complaint in the United States District Court for the Eastern District of Missouri against petitioner, the United States, and others for injuries resulting from the alleged malfunctioning of an egress life-support system manufactured by petitioner for use in military aircraft (A. 8a-12a). According to the complaint, which charged the defendants with "negligence and carelessness" (A. 10a), Captain Donham sustained permanent injuries while assigned for training to the 131st Tactical Fighter Group, Mis-

souri Air National Guard, when he was forced to use his egress life-support system to eject from an F-100D fighter aircraft (A. 9a).

Subsequently, petitioner filed a cross-claim for indemnity against the United States, alleging that the egress system had been manufactured according to government specifications and at all times after manufacture had been in the custody or control of the United States (A. 19a, 20a). Petitioner claimed indemnity "for the reason that defendant United States was actively negligent * * * and the negligence of defendant Stencel Aero Engineering Corporation, if any, was passive only" (A. 20a).

The United States moved for summary judgment against Captain Donham (A. 22a) and also moved to dismiss petitioner's cross-claim (A. 30a), on the ground that recovery against the United States on either claim was barred by *Feres* v. *United States*, 340 U.S. 135. The district court granted both motions (A. 31a-34a).

The court of appeals affirmed the dismissal of the cross-claim (A. 36a-55a), holding that the Federal Tort Claims Act did not waive sovereign immunity to third-party indemnity claims arising out of injuries to military servicemen.[1] The court held that the considerations that caused this Court, in *Feres* v. *United States*, *supra*, to bar claims against the United States by servicemen, for injuries incurred incident to their military service, applied as well to

[1] Captain Donham did not appeal from the district court's grant of summary judgment in favor of the United States.

third-party claims against the United States for indemnity for damages arising from such injuries. The court stated (A. 53a): "[w]e cannot agree with [petitioner] that the general language of the [Federal Tort Claims Act] was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concomitant obligations and liabilities imposed by the states upon private citizens." The court observed that it would be "anomalous" to insulate the United States from direct claims by injured servicemen "but authorize a third party in the position of [petitioner] to force the United States to indirectly pay those damages" (A. 44a).

SUMMARY OF ARGUMENT

A. In *Feres* v. *United States*, 340 U.S. 135, this Court held that Congress, in enacting the Federal Tort Claims Act, did not intend to subject the United States to suits brought by servicemen for injuries incurred incident to military service. In this case, petitioner seeks to subject the United States to suit for indemnification with respect to such injuries, resulting from use of equipment manufactured by petitioner. The legal theories to be pursued, and the facts necessary to be proved in this suit, are essentially identical to those that would be involved in a suit brought directly against the United States by the injured serviceman himself. Petitioner claims that the active negligence of the United States caused the serviceman's injury, and any forthcoming litigation

will focus on the alleged actions or inactions of military officers who designed, tested, approved, contracted for, and maintained the egress system. The issue here, therefore, is whether Congress intended to permit a commercial manufacturer to bring litigation of this kind when it has barred suit by the injured serviceman.

In the absence of decisive statutory language or legislative history, the Court has found it useful to look to the consequences of claimed tort remedies in a military context in order to gain "insight for determination of congressional purpose." *Brooks* v. *United States*, 337 U.S. 49, 52. This Court's decision in *Feres* v. *United States, supra,* that Congress did not provide a cause of action dependent upon state law for direct claims by servicemen, relied upon three practical considerations: the inconsistency of that remedy with the comprehensive statutory compensation scheme for military personnel, the disruptive effect of tort litigation on the discipline required for effective military action, and the distinctively federal character of the military. These considerations are equally compelling here.

The third-party remedy petitioner seeks does not comport with the military compensation scheme, an important function of which is to limit liability incurred by the United States in connection with its military activities. Indemnity actions would breach this protective mantle to the same extent as the barred direct claims.

Because the facts to be litigated in petitioner's suit are nearly identical to those that would be litigated in an action brought directly by the serviceman, the litigation process in each case would have the same adverse effects on the internal relationships within the military. Adjudicating indemnity claims would require the courts to pass on the propriety of military decisions and would place military personnel in the position of testifying about the propriety of each other's action, with possible consequent disruption of discipline and the orderly conduct of military affairs.

To make state tort law a factor in the placement and movement of military forces would be inconsistent with the distinctively federal character of the military and with the principle that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Feres* v. *United States, supra,* 340 U.S. at 143-144; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306.

B. Even if the Tort Claims Act waives sovereign immunity to suits for indemnity in this context, petitioner's claim fails to meet the prerequisites for tort indemnity under federal law. Where federal law imposes a bar to direct claims by an injured party, the implications of that bar for third-party actions are also properly decided by reference to federal law. See, *e.g., Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 347 (C.A. 1); *Galimi* v. *Jetco, Inc.*, 514

F.2d 949 (C.A. 2). Under federal law, indemnity requires liability running from both the purported indemnitor and the indemnitee to the injured party; indemnity is not available from the United States where its direct liability to the injured party is barred by sovereign immunity. See, *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951.

Where, as here, the relationship between the purported indemnitor and indemnitee arises in a commercial setting, there is no unfairness in limiting liability to that spelled out in the contract. The price that petitioner obtained for its egress system could have reflected all the risks associated with the contract, including the risk of liability to the users of petitioner's equipment in the event of accident. Preclusion of indemnity here merely ensures that subsequent court action will not undermine the allocation of risks explicit or implicit in the contractual undertaking.

ARGUMENT

THE UNITED STATES IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT FOR THIRD-PARTY CLAIMS FOR INDEMNITY FOR DAMAGES PAID TO SERVICEMEN INJURED IN ACTIVITY INCIDENT TO MILITARY SERVICE

A. The Tort Claims Act Does Not Waive Sovereign Immunity To Such Claims For Indemnity

More than twenty-five years ago, this Court decided that Congress, in enacting the Federal Tort Claims Act, did not make the United States liable for the damage claims of servicemen injured in activities incident to their military service. *Feres* v. *United States*, 340 U.S. 135. This case presents the question whether the government nevertheless may indirectly be held liable for such injuries in actions brought by third parties for indemnification.

Petitioner argues (Br. 9-15) that to evaluate its claim for indemnification the Court should look to the broad language of the Tort Claims Act, to its specified exceptions, and to "whether * * * there is evidence that Congress did not intend to bring the particular claim within the purview of the [Act]" (Br. 11). The United States does not contest that these are proper inquiries; indeed, we find the third one decisive in this case. We differ with petitioner only in our conclusion, based upon the same factors that this Court found compelling in *Feres*, that Congress did not intend to permit third-party

indemnity claims arising out of injuries to servicemen incident to their military duties.[2]

1. ***Petitioner's theory of the government's liability is essentially the same as would be advanced by the injured serviceman if his action were not barred***

Because an indemnity suit would be substantially identical in nature and practical effect to the litigation of an action for damages brought directly by the injured serviceman, the court of appeals correctly held that the "considerations underlying *Feres* require a limitation of the right under the [Federal Tort Claims Act] to seek indemnity" (A. 45a). Petitioner does not disagree with the conclusion that under *Feres* Captain Donham is barred from bringing an action directly against the United States.[3]

[2] We are concerned here solely with congressional intent with respect to indemnity actions arising out of injuries to servicemen incurred in activity incident to military service. We do not dispute that Congress intended to allow claims for indemnity or contribution in the ordinary civilian context. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

[3] At the time of the accident, Captain Donham was engaged in military training as a member of the Missouri Air National Guard. The air national guard is a component of the Air Force of the United States (10 U.S.C. 8062, 8077). Although they function as state militia, air national guard units are at all times subject to federal control and the President prescribes regulations and issues orders necessary to organize, discipline, and govern them (32 U.S.C. 110). The organization, location, and composition of air national guard units are determined by the Secretary of the Air Force (32 U.S.C. 104); the inactive duty training of all units of the air national guard also is subject to regulations prescribed by the Secretary of the Air Force (32 U.S.C. 502). Training for the air defense of the United States, such as Captain Donham

Petitioner instead argues (Br. 16) that the analogy between a direct action and an indemnity action is misdrawn and that petitioner's claim concerns only "the negligence of the United States in its dealings with [petitioner]." An analysis of petitioner's cross-claim (A. 19a-21a) demonstrates, however, that the suggested distinction between petitioner's indemnity action and Captain Donham's direct action is without practical significance.

The United States has no contractual obligation to indemnify petitioner; petitioner's indemnity claim is based on an alleged "tortious relationship between [petitioner] and the United States * * *" (Br. 33). Petitioner asserts a right to indemnity because the "character of the negligence of the United States was

was performing at the time of the accident, is within the express responsibility of the Aerospace Defense Command (Air Force Regulations No. 23-9, 12 February 1968).

In recognition of the federal service performed by air national guardsmen, including guardsmen in inactive duty status, the United States not only pays the salaries of personnel performing training duties but also provides hospitalization, medical care and compensation for disablements suffered during training (32 U.S.C. 318, 319, 320). Additionally, the survivors of guardsmen who die while performing authorized training duties are eligible for death gratuities (32 U.S.C. 321). As a result of these factors, the courts have been uniform in holding that the *Feres* doctrine is applicable to national guardsmen, including those performing inactive duty for training. See *Layne* v. *United States*, 295 F.2d 433 (C.A. 7), certiorari denied, 368 U.S. 990; *Herreman* v. *United States*, 476 F.2d 234, 235 (C.A. 7); *Peluso* v. *United States*, 474 F.2d 605 (C.A. 3); *Coletta* v. *United States*, 300 F.Supp. 19 (D. R.I.). Cf. *United States* v. *Carroll*, 369 F.2d 618 (C.A. 8).

such as to create [petitioner's] liability to someone else" (Br. 17).

More specifically, Captain Donham alleges that petitioner is liable on account of a negligent "defect in the ejection system manufactured by [petitioner]" (Pet. Br. 3). In turn, petitioner alleges "that if there was a defect in the ejection system it was due to the specifications, requirements and components provided by the United States" (*ibid.*). Thus petitioner pleads the elements of a classic indemnity claim by a joint tortfeasor that while the United States was "actively negligent," petitioner's negligence, if any, was "passive only" (A. 20a). At bottom, therefore, the indemnity claim is founded on the legal theory that the negligence of the United States was the proximate cause of the injury to Captain Donham. Absent proof that negligent acts or omissions attributable to the United States caused Captain Donham's injury, petitioner has no basis for any claim against the United States.[4]

Because petitioner must establish that the United States was a "joint tortfeasor" (Br. 23) with respect to Captain Donham's injury, the litigation that petitioner proposes would be indistinguishable, as a practical matter, from the litigation of Donham's own claim against the United States. The litigation as to liability would focus on the alleged actions or inactions of the military officers who had responsibility for the design, testing, purchase, and maintenance of the egress system and its component parts. The military personnel involved would be the subjects of written discovery and would be required to give depositions and courtroom testimony concerning the propriety of actions taken by themselves and other military personnel pursuant to their official duties.

[4] The United States had no duty of care to petitioner. If there is any duty from the United States to petitioner independent of the government's alleged tortious injury to Donham, it must be implied "in fact" from their contractual relationship and adjudicated in the Court of Claims. See *Travellers Insurance Co.* v. *United States*, 493 F.2d 881 (C.A. 3); *Murray* v. *United States*, 405 F.2d 1361 (C.A.D.C.); 28 U.S.C. 1346(a)(2).

The military duties involved here relate to the design and maintenance of military aircraft; other cases could concern, for example, the use of an automatic machine gun or armored vehicle in combat training. In each case, an indemnity claim by the manufacturer would constitute a procedural device for the litigation of the same factual issues that would be litigated by the injured serviceman if he could sue the United States directly. Similarly, the damages recovery (other than possibly litigation costs) under an indemnity theory would correspond to the amount payable had the serviceman been permitted to sue directly. Damages would be measured by the injury to the serviceman, since there is no injury to the manufacturer independent of the serviceman's underlying action.

Petitioner misses the point in arguing (Br. 27-28) that Donham's action against it may be different in substance from its action against the United States. The relevant comparison is between petitioner's suit

against the United States and the suit that Donham is barred from bringing against the United States. Those suits are essentially identical as to the underlying legal theory, the proof that would be required to establish liability, and the amount of damages at issue. Thus the question here is whether Congress, which precluded such suits when brought directly by the injured serviceman, intended to permit commercial manufacturers to bring functionally identical suits under an indemnity theory.

2. *The reasons for barring the serviceman's action apply equally to petitioner's suit for indemnity*

a. *Permitting the serviceman's action would be inconsistent with the statutory compensation scheme for military personnel, would disrupt military discipline, and would be inappropriate in view of the distinctively federal character of the military*

In *Feres*, the executrix of a serviceman killed in a barracks fire attempted to recover damages from the United States on the theory that the military had negligently quartered the serviceman in an unsafe facility.[5] The executrix based her claim upon the broad sweep of the language of the Tort Claims Act and the absence of any express exclusion of servicemen's claims (cf. Pet. Br. 9-23). This Court made clear, however, that the Tort Claims Act cannot be

[5] Decided together with *Feres* was *Jefferson* v. *United States* and *United States* v. *Griggs, Executrix*, both of which involved claims of negligent medical treatment (340 U.S. at 137).

assumed to have waived sovereign immunity for claims arising in a military context. Whether that Act "extends its remedy" must be determined by an examination of "all the circumstances" including "the status of both the wronged and the wrongdoer" (340 U.S. at 142).[6] The Court concluded that the question of congressional intent with respect to actions arising in a military context was to be resolved by reference to three considerations: the consistency of the remedy with other existing statutory schemes, the requirements of military discipline, and the federal character of the military.

The Court proceeded from the premise that the Tort Claims Act cannot be viewed in isolation but "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (340 U.S. at 139). Military personnel are covered by a comprehensive scheme of statutory compensation,[7] and the Court could not escape "attributing some bearing" to the congressional scheme "of simple, certain, and

[6] The legislative history of the Tort Claims Act is inconclusive on the question of remedies in a military context. See *Brooks* v. *United States*, 337 U.S. 49; *Feres* v. *United States*, *supra*, 340 U.S. at 139-140. The legislative history relied upon by petitioner (Br. 20-22) relates to the availability of an indemnity action generally (see *United States* v. *Yellow Cab Co.*, 340 U.S. 543); it does not suggest that indemnity claims arising from injuries to servicemen ever were contemplated by Congress.

[7] See, *e.g.*, 38 U.S.C. 301 *et seq.*, 401 *et seq.*, and 601 *et seq.*

uniform compensation for injuries or death of those in armed services" (340 U.S. at 144; footnote omitted). The Court found it unlikely that Congress would have intended to provide active duty servicemen an additional tort remedy, since apparently "there was no awareness [by Congress] that the Act might be interpreted to permit recovery for injuries incident to military service" (*ibid.*).

The Court also recognized that tort litigation would have an adverse effect on military discipline, an effect which Congress could not have intended. In *Brooks* v. *United States*, 337 U.S. 49, the Court had held that a serviceman on furlough could recover under the Tort Claims Act for injuries not incident to military service. The Court determined, however, that Congress had intended a different result in the case of a soldier "injured while performing duties under orders" (340 U.S. at 146).[8] The Court's reasoning was summarized in its subsequent decision in

[8] In *Brooks*, the Court had expressly reserved the issue of liability arising from injuries incident to service (337 U.S. at 52-53):

> Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. * * * The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

United States v. *Brown*, 348 U.S. 110,[9] where the Court explained (348 U.S. at 112):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed, led the Court [in *Feres*] to read [the Tort Claims] Act as excluding claims of that character.

Finally, the Court's holding with respect to legislative intent in *Feres* reflected the special relationship between the government and the members of its armed forces, a relationship that the Court aptly termed "distinctively federal in character" (340 U.S. at 143). Whereas under the Tort Claims Act liability depends upon state law, "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at 143-144).[10]

[9] In *Brown*, the Court ruled that a discharged veteran could sue under the Tort Claims Act for an injury that occurred during hospitalization after discharge because the veteran was not "on active duty or subject to military discipline" and enjoyed a "civilian status" when the injury occurred (348 U.S. at 112). Justice Black, in dissent, argued that *Feres* should control because "the injury is inseparably related to military service" (348 U.S. at 114).

[10] The Court also noted that the Tort Claims Act imposes liability on the United States only "to the same extent as a private individual under like circumstances" (28 U.S.C. 2674) and that there is no "liability 'under like circumstances', for

The amalgam of all these factors was sufficient to convince the Court that Congress did not intend to establish a Tort Claims Act remedy for injuries to active duty servicemen incident to their military duties. The Court summarized (340 U.S. at 146):

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

b. *Similar considerations pertain here and preclude subjecting the United States to liability as indemnitor where it would not be liable to the serviceman*

As the court of appeals recognized, the *Feres* decision provides the analytical framework for resolving the issue of congressional intent as to third-party indemnity claims arising out of injuries to service-

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no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command" (340 U.S. at 141-142). Subsequent decisions which arguably have eroded the requirement of parallel private liability have been careful to note that the military context has a unique claim to federal rather than state law. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69.

men incident to service. As we have demonstrated (pp. 10-14, *supra*), a third party's action for indemnity requires proof that the acts or omissions of the military were the proximate cause of the serviceman's injury and therefore is essentially identical in substance to a suit brought by the serviceman directly against the United States. We now show that consideration of the consequences of allowing indemnity actions in the military context indicates a "congressional purpose to leave injuries incident to service where they were." *Brooks* v. *United States*, *supra*, 337 U.S. at 53.[11]

i. Indemnification would frustrate the limited-liability function of the veterans' compensation scheme

This Court consistently has looked to the presence of a statutory compensation scheme as an important indicator of congressional intent with respect to claimed remedies under the Federal Tort Claims Act. While the presence of a compensation statute "does not of necessity preclude a suit for negligence" (*United States* v. *Muniz*, 374 U.S. 150, 160), liability has not been permitted where the injury is covered by the compensation statute and "nothing in the legislative history of [the Federal Tort Claims Act] * * * pointed to any purpose to add tort claim

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[11] Petitioner characterizes the use of the practical guideposts identified in *Feres* as an "appropriateness test" (Br. 29). But, as this Court pointed out in *Brooks* v. *United States*, *supra*, 337 U.S. at 52, "consequences may provide insight for determination of congressional purpose."

recovery." *United States* v. *Demko*, 385 U.S. 149, 152.

Where servicemen have been injured in activities not incident to their military service, the servicemen's compensation scheme has been held not to preclude recovery under the Federal Tort Claims Act. *United States* v. *Brown*, *supra*, 348 U.S. at 113; *Brooks* v. *United States*, *supra*, 337 U.S. at 53. By contrast, the presence of a comprehensive scheme established to compensate for servicemen's injuries was one of a number of factors useful in identifying Congress' intent that the Federal Tort Claims Act not provide a cause of action for military servicemen for injuries incident to their military service. *Feres* v. *United States*, *supra*, 340 U.S. at 139.

As in *Feres*, the tort remedy claimed here is inconsistent with the military compensation scheme in its principal area of application, coverage for injuries arising out of activity incident to military service. One of the important functions of any statutory compensation scheme is that it limits, as well as determines, the extent of liability arising from an injury. Indemnity recovery would frustrate that function of the servicemen's compensation scheme by substantially enlarging the government's potential liability for an injury to a serviceman incident to service. While this practical consequence of an indemnity remedy may not be decisive, it is one useful indicator of Congress' probable intent in enacting the Tort Claims Act.

A basic premise in *Feres* was that tort actions arising out of injuries to servicemen must comport with the larger statutory scheme of remedies against the government. The complex system of statutes granting veterans compensation addresses a situation in which the United States employs enormous numbers of personnel in an occupation that by its nature is fraught with immense physical risk. The legislation that evolved over the years "provide[s] systems of simple, certain, and uniform compensation for injuries or death of those in armed services." *Feres* v. *United States*, *supra*, 340 U.S. at 141 (footnote omitted). The modern system of limited liability without fault is traceable to the Act of October 6, 1917, which established "a new and practical scheme of disability and death compensation analogous to workmen's compensation legislation." S. Rep. No. 1584, 80th Cong., 2d Sess., p. 5 (1948).[12] In *Feres*, this Court noted that "recoveries compare extremely favorably with those provided by most workmen's compensation statutes" (340 U.S. at 145).

The veterans compensation scheme represents a legislative balancing of the need to limit public expenditure against the desire to make adequate repara-

[12] "The conscience of the people of our time has enacted into law workmen's compensation. * * * That is the principle upon which this bill is founded." Hearings on H.R. 5723 before the House Committee on Interstate and Foreign Commerce, 65th Cong., 1st Sess., p. 42 (1917) (Statement of Samuel Gompers, President of the American Federation of Labor and Member of the Advisory Commission of the Council of National Defense).

tion for injuries arising out of dangerous public service. Like workmen's compensation, veterans compensation performs two functions. It provides benefits to the injured employee, in this context the serviceman and his dependents, while at the same time shielding the operations of the employer, in this context the government, from otherwise indeterminate liability. Like other compensation arrangements, that for veterans "not only * * * provide[s] for employees 'a remedy which is both expeditious and independent of proof of fault, but also for [the] employer a liability which is limited and determinate.'" *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D. D.C.) (emphasis omitted).

This Court has noted the "protective mantle" afforded by compensation schemes. *Cooper Stevedoring Co., Inc.* v. *Kopke, Inc.*, 417 U.S. 106, 115. Recognizing the importance of this "protective mantle" to the integrity of statutory compensation plans, a number of courts have refused to permit third-party actions for indemnity that would "strip * * * an employer, of the protection of a compensation act." *Slattery* v. *Marra Bros., Inc.*, 186 F.2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915. "If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defendant." *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373, 1376 (E.D. N.Y.), affirmed, 505 F.2d 727 (C.A. 2), certiorari denied *sub nom. DiGiorgio* v. *United States*, 420 U.S. 990. See also *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (C.A. 2); *Busey* v. *Washington, supra.*

In the military context, this protective function of the veterans compensation scheme corresponds in importance to the enormous scope of potential liability. Yet, the protection that it offers to the government would be seriously weakened if third parties were permitted indemnification for damages incurred as a result of injuries to servicemen incident to service. For example, in this case the protective mantle would be breached equally by either a direct claim by Captain Donham or an indemnity claim by petitioner. In an age of almost completely mechanized military operations, an injured serviceman or his representative will often be able to locate a manufacturer in petitioner's position to act as the intermediate defendant and thus to subject the United States to an indirect liability for the same conduct for which it could not be held directly liable. As the court of appeals said, "it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of [petitioner] to force the United States to indirectly pay those damages" (A. 44a). This Court said in *Laird* v. *Nelms*, 406 U.S. 797, 802:

> To permit respondent to proceed * * * here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the [Federal Tort Claims] Act permits such a result.

In the absence of explicit legislative guidance, Congress should not be deemed to have intended a result that would frustrate a major function of the

veterans compensation scheme. Only by precluding third-party as well as direct claims based on the injuries to active duty servicemen will the Tort Claims Act "be construed to fit * * * into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States, supra,* 340 U.S. at 139.

ii. Third-party indemnity claims would have the same adverse effects on military discipline as claims brought directly by the injured serviceman

Military service entails special requirements of discipline and order that contrast sharply with relationships among private citizens. See *Orloff* v. *Willoughby,* 345 U.S. 83; *Parker* v. *Levy,* 417 U.S. 733; *Greer* v. *Spock,* 424 U.S. 828; *Middendorf* v. *Henry,* 425 U.S. 25. Crucial characteristics of that setting are "[v]igor and efficiency on the part of the officer and confidence among the soldiers in one another." *In re Grimley,* 137 U.S. 147, 153. This Court accordingly recognized in *Feres* and later cases that Congress did not intend the courts to pass on the propriety of military decisions or to place members of the service in the position of having to testify in an adversarial setting as to each other's actions. "[I]t is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs." *Henninger* v. *United States,* 473 F.2d 814, 815-816 (C.A. 9), certiorari denied, 414 U.S. 819.

As we have shown (pp. 10-14, *supra*), the litigation of petitioner's indemnity suit would be nearly

identical in substance to the litigation that Captain Donham would pursue directly against the United States, were his claim not barred. There is no way to predict precisely where petitioner may attempt to lay the blame for Captain Donham's injury, but it is clear that the military officers who had ultimate responsibility for the design, procurement, maintenance, or use of the ejection system will be principal targets of the inquiry.

The fact that in this particular case the military personnel who will be deposed or required to execute affidavits or testify may not be the injured serviceman's immediate commanding officers (Pet. Br. 27) cannot be determinative of the propriety of allowing indemnity claims. At least two of the claims before the Court in *Feres* related to injuries inflicted by medical personnel rather than by officers commanding the injured claimants. But this Court properly refrained from establishing a rule that would make waiver of sovereign immunity turn on which military officers are alleged to have been negligent. Instead, the Court recognized that the congressional intent was generally to avoid tort suits that would require courts to review decisions made by military personnel in the course of their military responsibilities. Cf. *Henninger* v. *United States, supra.* The prospect of such review, and of potential governmental tort liabilities, might exert improper pressures on officers and result in hesitation where decisive judgment is called for.[13]

[13] Petitioner argues (Br. 27) that even if the government is not immune from third-party claims, the discretionary

The Court in *Feres* therefore correctly determined that Congress, in enacting the Tort Claims Act, did not mean to subject relationships within the military to state negligence law.

Petitioner argues (Br. 27) that even now there may be interference with military discipline when defendants to suits brought by servicemen assert that acts or omissions by commanding officers constituted an intervening cause of injury. It is certainly true that in some suits plaintiffs or defendants may seek to raise such matters and thereby involve military officers in the litigation.[14] But it is also true that the availability of an indemnity action would provide strong incentive to join the government as a defendant as a matter of course, thereby necessarily increasing the involvement of military personnel. The fact that the goal of freeing the military from the disruptive burdens of tort litigation may occasionally

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function exception to the Tort Claims Act (28 U.S.C. 2680 (a)) would preclude liability arising from military orders. The courts of appeals have placed a narrow interpretation on the scope of the discretionary function exception. See, *e.g.*, *Moyer* v. *Martin Marietta Corp.*, 481 F. 2d 585, 594-598 (C.A. 5). Cf. *Dalehite* v. *United States*, 346 U.S. 15. In addition, the courts have often required extensive litigation in order to determine whether the governmental action properly fits within their interpretation of the exception, litigation that would frustrate Congress' intent to free the military from the burdens and adverse effects of civil tort litigation arising out of their military responsibilities.

[14] Of course, since the United States would not be a party, discovery would be limited by the necessity to obtain personal jurisdiction over the officers and by the absence of any right to serve interrogatories to be answered by them. See Rules 33 and 45, Fed. R. Civ. P.

be frustrated even under the present scheme does not justify the wholesale frustration that inescapably would occur if, as petitioner urges, this Court sanctions the third-party action petitioner seeks to bring.

iii. A Tort Claims Act remedy by way of indemnity would place state law restraints on federal military actions

This Court in *Feres* concluded that a Tort Claims Act remedy that would cause liability to be dependent upon the vagaries of state law would be inconsistent with the exclusively federal character of the military. This consideration is equally applicable when the basis for liability is couched in terms of indemnification.

The military is called upon to play a unique and important national role in our society. It must maintain mobility and train troops in such places, times, and conditions as it sees fit for the effective performance of its defense mission. As the court of appeals stated, "[t]he Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties" (A. 43a). While the laws of many states may prohibit indemnification on a tort theory where, as here, the third party defendant is not directly liable to the original plaintiff, other states may permit such indemnification. The result would be to subject the military to substantial potential liabilities, depending upon the peculiarities of state law and upon where its troops are trained and quartered.

Considerations such as these led this Court in *Feres* to conclude that direct tort liability to servicemen would be inconsistent with the military relationship which is "distinctively federal in character" and that the "scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at 143-144, quoting from *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306). Indemnity remedies, which would have virtually the same impact on the execution of federal military responsibilities, should not be read into the Federal Tort Claims Act either. The court of appeals correctly summarized (A. 53a):

> While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant cases. We cannot agree with [petitioner] that the general language of the [Federal Tort Claims Act] was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concomitant obligations and liabilities imposed by the states upon private citizens.

See also *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951; *Adams* v. *General Dynamics Corp.*, 535 F.2d 489 (C.A. 9), petition for a writ of certiorari pending *sub nom.*

General Dynamics Corp. v. *United States*, No. 76-220. But see *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (C.A. 5) (where the court rejected an indemnity claim on the basis of state law).[15]

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[15] Petitioner contends that the decision below and other like decisions, such as *Wiener*, conflict with *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597. But *Weyerhaeuser* did not involve the Federal Tort Claims Act. It arose under the Public Vessels Act, which provides a remedy against the United States "for damages caused by a public vessel of the United States" (46 U.S.C. 781). After a collision between a government vessel and a private vessel, the owner of the private vessel claimed damages pursuant to the divided damages rule in mutual fault collisions, "a rule of admiralty law which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (372 U.S. at 603). Unlike the instant case, where the question is whether Congress created a new right of recovery, the issue in *Weyerhaeuser* was whether a preexisting right of recovery had been abrogated by Congress. This Court's decision in *Weyerhaeuser*, that there was "no evidence whatever that Congress [in enacting the Federal Employees' Compensation Act] was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law" (372 U.S. at 601), has no bearing on Congress' intent in enacting the Tort Claims Act.

Like *Weyerhaeuser*, *Wellington Transportation Company* v. *United States*, 481 F.2d 108 (C.A. 6), was brought pursuant to the Public Vessels Act and the court held simply that *Feres* would not bar the longstanding right to attorney's fees "that under federal maritime law * * * are consistently awarded" (481 F.2d at 111). Neither the Public Vessels Act nor a longstanding right to indemnity are involved where claimants seek third-party recovery under the Tort Claims Act for injuries to servicemen, and decisions that have relied upon these admiralty cases to resolve the question of congressional

iv. The allowance of noncontractual indemnity is not required by equitable considerations

Petitioner urges that the Court's interpretation of the Federal Tort Claims Act should be influenced by the absence of any alternative remedy for petitioner against the United States (Br. 14-15).[16] But whatever might be said of the equity in other situations, where the relationship between the third party seeking indemnity and the purported indemnitor arises in a commercial setting, there is no unfairness in limiting liability to that expressly assumed by contract.

Petitioner's relationship to the United States is that of manufacturer to contract buyer, and the rights and obligations of parties so related can fairly be confined to those established by the terms of their contract. In this case, for example, the price charged

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intent in passing the Tort Claims Act are in error. See, *e.g.*, *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (C.A. 10), certiorari denied, 409 U.S. 1125.

[16] There is, of course, substantial doubt whether petitioner will be held liable to the original plaintiff, Donham. Even if Donham is able to prove his charge of faulty specifications, if, as petitioner alleges, petitioner relied exclusively upon specifications provided by the United States, petitioner should not be liable to Donham. See *Littlehale* v. *E. I. duPont de Nemours & Co.*, 268 F. Supp. 791, 804 (S.D. N.Y.), affirmed, 380 F.2d 274 (C.A. 2); *Dolphin Gardens, Inc.* v. *United States*, 243 F. Supp. 824, 827 (D. Conn.). See also *Myers* v. *United States*, 323 F.2d 580 (C.A. 9); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14, 16 (C.A. 9); *Person* v. *Cauldwell-Wingate Co.*, 187 F.2d 832 (C.A. 2), certiorari denied, 341 U.S. 936; *Davis* v. *Henderlong Lumber Company*, 221 F. Supp. 129 (N.D. Ind.).

by petitioner for development and manufacture of the egress system could have reflected all the risks and costs arising out of the contract. In particular, the price may well have covered the cost of liability insurance, or the cost of being a self-insurer, with respect to accidents of the very kind suffered by Captain Donham, the original plaintiff here.

Whether or not the contract price in fact was sufficient to compensate petitioner for all risks associated with the contract, the compelling fact is that petitioner voluntarily chose to do business without the protection of a contractual provision for indemnification and now seeks to reset the terms of the arrangement.[17] Preclusion of indemnity in these circumstances simply leaves standing the allocation of risks explicit or implicit in the contractual undertaking. There is nothing inequitable in this result.

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[17] The equity concerns here therefore are clearly different in kind from those raised by the plight of the injured private individual in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 320, where this Court feared that "when the entire burden falls on the injured party it may leave him destitute or grevi-ously harmed." Petitioner's reliance upon *United States* v. *Yellow Cab Co.*, 340 U.S. 543, also is misplaced. There, this Court found untenable a situation in which, if the government was sued directly, it could seek indemnity or contribution against a joint tortfeasor, but if the joint tortfeasor was sued directly, no third party action could be brought against the government. In contrast, in the military context presented here, the government cannot be sued directly, so that there is no possibility of the exercise of a one-way right to seek indemnity for damages for the original plaintiff's injury.

This case ultimately rests on congressional intent. If this Court's reading of congressional intent in *Feres* had been erroneous, Congress could have been expected to show its disapproval. As the Court itself noted, "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138). But more than a quarter of a century has passed, and Congress has done nothing to disturb the *Feres* result. Cf. *Laird* v. *Nelms*, *supra*, 406 U.S. at 802. The necessary inference is that this Court's reading was correct. And that reading governs this case as well.

In *Feres*, this Court stated that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146) and "that Congress, in drafting this Act, [did not] create[] a new cause of action dependent on local law for service-connected injuries or death due to negligence" (*ibid.*). Petitioner here asserts a cause of action, and seeks to impose a liability, that this Court found not to exist under the Tort Claims Act.

The military must carry out an inherently dangerous mission utilizing manufactured vehicles and weapons of warfare. In such circumstances, the potential number of indemnity claims by manufacturers, who themselves may be found liable to injured servicemen, is enormous. The practical significance of the *Feres* doctrine would be seriously lessened if such indemnity claims were to be permitted.

The practical result would be the involvement of the military in a major way in the litigation of tort claims arising out of active duty military service. For officers with broad supervisory responsibility, the time spent in the litigation process could be onerous. The potential effects on military discipline, the exercise of judgment, and the training, movement, and utilization of troops, while necessarily speculative, could be significantly deleterious. While it is not possible to determine with precision the exact impact that petitioner's claimed remedy would have on the supervisory responsibility of the military over its personnel, it is clear that indemnity would involve a complex of important federal interests, and that it is peculiarly within the power of Congress to alter the "settled * * * practice" precluding tort litigation if it wishes. See *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 316.

This Court faced a similar situation in *United States* v. *Gilman*, 347 U.S. 507, where the United States asked the Court to permit it to bring a cause of action for indemnity against an employee whose negligence had resulted in the liability of the United States to a third party under the Tort Claims Act. The Court found that the claimed indemnity remedy would undoubtedly have impacts upon employee relationships, morale and fiscal policy, but that the Court had "no way of knowing what the impact of the rule of indemnity we are asked to create might be" (347 U.S. at 510). The Court concluded that it was for Congress and not the courts to weigh the full impli-

cations of such a rule, and that until Congress spoke it would be inappropriate for the court to imply a new cause of action for indemnity (347 U.S. at 511-513; footnote omitted):

> Here a complex of relations between federal agencies and their staff is involved. Moreover, the claim now asserted, though the product of law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

This reasoning is equally applicable to this case and indicates that the Court should not interpret the Tort Claims Act as permitting indemnity suits against the United States based upon injuries suffered by military personnel incident to military service.

B. If Sovereign Immunity Has Been Waived, Nevertheless Federal Indemnity Doctrines Govern Here, And They Preclude Recovery Where The United States Lacks Direct Liability To The Injured Person

Noncontractual indemnity is an equitable device for the just apportionment of liability between joint tortfeasors.[18] Indemnity, unlike contribution, places

[18] See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Ia. L. Rev. 517 (1952).

the entire burden of damages upon one of two liable parties, on the theory that the negligence of the indemnitor has been active or primary, and the negligence of the indemnitee only passive or secondary.

Whether the normal indemnity rules should function where one of the joint tortfeasors is immune from suit by the plaintiff is a question that has given rise to controversy and division in state judicial decisions.[19] Where the bar to direct suit arises out of federal law, however, the implications of that bar for indemnity actions are to be determined by federal rather than state law. For example, where the Federal Employees' Compensation Act bars direct liability to the original plaintiff, but indemnity is claimed by a third party, the courts correctly have held that "the government's immunity from suit under FECA is federally created and the dimensions of that exemption must be measured by federal rather than state standards." *Sheridan* v. *DiGiorgio*, *supra*, 372 F. Supp. at 1375; *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 346-347 (C.A. 1). See also *Travellers Insurance Co.* v. *United States*,

[19] A majority of the states bar indemnity suits against an employer who has paid workmen's compensation to the injured employee. "When a workman's compensation plan does cover particular employers and employees, a third-party suit against an employer who was also negligent is barred by the majority rule." *United States* v. *Seckinger*, 397 U.S. 203, 214 n. 19. Indemnity may sometimes be made available on a contractual or quasi-contractual theory in such circumstances, as in *Seckinger* itself. But petitioner's theory of recovery does not rest upon any contractual undertaking by the United States to hold petitioner harmless.

493 F.2d 881 (C.A. 3); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (C.A. 2).

The same rule should apply to suits for indemnity arising out of injuries to servicemen incident to service. While local law is determinative in the typical case involving joint tortfeasors (*United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551 n. 8), nothing in the language or legislative history of the Federal Tort Claims Act suggests that the indemnity implications of a federal bar to direct claims must be decided by reference to state rather than federal law. While many states, including Missouri, preclude noncontractual or tort indemnity where the injured party is covered by statutory compensation,[20] state law gen-

[20] Petitioner is incorrect in stating (Br. 19) that its indemnity claim would be allowed under Missouri law. Petitioner's claim would fail on at least three grounds.

First, Missouri law requires indemnity only where there is a breach of duty running from the indemnitor to the indemnitee independent of any duty to the injured party. No duty recognized by Missouri law runs from a purchaser (the United States) to a seller (petitioner). Indeed, Missouri courts have previously rejected indemnity claims by a manufacturer against a purchaser arising out of injuries to a third party from the use of the manufactured product. See *Lewis* v. *Amchem Products, Inc.*, 510 S.W.2d 46, 49 (Mo. Ct. App.).

Second, where the purported indemnitor is covered by the protective mantle of a workman's compensation scheme, Missouri only permits indemnity where there is a breach of duty running from the indemnitor to the indemnitee that the indemnitor *expressly* agreed to perform. *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788, 796 (Mo. Sup. Ct.); *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W.2d 693, 699 (Mo. Ct. App.). In the absence of such an express agreement, the purported indemnitor's liability to the injured party or to any third party ends with the payment of the statutory compensation. *Howard* v. *Wilson Concrete Co.*, 57 F.R.D. 8, 11 (W.D. Mo.).

Third, indemnity is allowed only when the indemnitee's fault is constructive or passive only. *State* v. *McLaughlin*, 315 S.W. 2d 499, 507 (Mo. Ct. App.). Where, as here, both the indemnitor and the indemnitee are jointly charged with negligence, indemnity does not lie. *Lewis* v. *Amchem Products, Inc., supra*, 510 S.W.2d at 49; *State* v. *McLaughlin, supra*, 315 S.W.2d at 506-507. See generally Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 Mo. L. Rev. 307 (1963).

erally does not supply a satisfactory guide for decisions that will impact on the federal concerns underlying the preclusion of direct claims by servicemen.

A majority of the lower federal courts that have considered the matter have precluded contribution or indemnity claims in the presence of statutory compensation acts where the direct claim of the injured party was barred by the sovereign immunity of the United States.[21] The sovereign immunity bar removes the possibility of joint liability to the injured party, one of the fundamental prerequisites of federal common law indemnity. The leading case is *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951, where the court of appeals precluded indemnity or contribution in a case arising out of injuries to federal non-military em-

[21] By its remand in *Treadwell Construction Co.* v. *United States*, 372 U.S. 772, this Court left open the question whether federal common law would preclude indemnity in a situation where the purported indemnitor was not liable to the injured party.

ployees whose direct claims were barred by the Federal Employees' Compensation Act scheme. The court of appeals stated (335 F. 2d at 403):

> [N]either contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured. The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity.[22]

Similarly, in *Galimi* v. *Jetco*, *supra*, the Second Circuit held that where a statutory compensation scheme bars direct liability by the injured party, "a third-party claim for contribution or tort indemnity against the United States does not lie" (514 F. 2d at 953). See also *Kudelka* v. *American Hoist & Derrick Co.*, 541 F. 2d 651 (C.A. 7); *Travellers Insurance Co.* v. *United States*, 493 F. 2d 881 (C.A. 3); *Newport Air Park, Inc.* v. *United States*, *supra*; *Sheridan* v. *DiGiorgio*, *supra*; *Murray* v. *United States*, 405 F. 2d 1361 (C.A. D.C.). But see *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F. 2d 994 (C.A. 4), certiorari denied, 398 U.S. 958.[23]

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[22] Petitioner has never claimed that his alleged indemnity rights are based upon either an explicit or implied contractual undertaking. Cf. *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, 133-134. Any claim of indemnity based upon the contract between petitioner and the United States could properly be brought only in the Court of Claims. See note 4, *supra*.

[23] Cf. *Slattery* v. *Marra Bros., Inc.*, 186 F.2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915 (Judge L. Hand) ("We cannot, however, agree that that result [indemnity] is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong."

Compelling policy considerations underlie adherence to the requirement of joint liability as a condition to tort indemnity under federal law. Where the liability of the purported indemnitor to the injured party is barred by statute, a decision by the courts to permit indemnity and impose liability for the underlying injury by indirection would represent a judicial overruling of a legislative judgment. In this case, for example, Congress has declined to waive sovereign immunity to suits by the original plaintiff, and the allowance of indemnity would undercut that legislative determination. Moreover, judicial imposition of indemnity would be especially inappropriate where, as here, allowing indemnity would frustrate a statutory compensation scheme and threaten interference with the conduct of military activities (see pp. 18-29, *supra*).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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The United States in their filed Brief in this case stated:

> A third-party's action for indemnity requires proof that the act or omissions of the military were the proximate cause of the serviceman's injury and therefore is essentially identical in substance to a suit brought by the serviceman directly against the United States.

Brief of United States, p. 19. This claimed "identical" parallel between the suit brought by Stencel and the direct suit Donham is barred from bringing is the crux of the United States' argument in this case. The parallel fails in the one essential fact that makes these suits vastly different: Stencel *is not* a serviceman.[1]

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[1] The United States throughout its brief contends that "military" personnel issued the specifications requirements and com-

This fundamental difference in status is crucial in this case for it is Stencel's claim which must be evaluated in light of the Federal Tort Claims Act. Even in direct actions brought by servicemen the question of *their* status often determines the outcome of their actions. Thus, in *Brooks* v. *United States,* 337 U.S. 146 (1948) and *United States* v. *Brown,* 348 U.S. 110 (1954), the fact that the servicemen were not acting as servicemen when they were injured was sufficient to allow them to recover under the Federal Tort Claims Act. This Court, in those cases, did not consider whether the suits would involve the United States in extensive discovery procedures and litigation or whether there would be any disruption of military discipline. Yet, clearly, in both *Brooks* and *Brown* the conduct of military personnel was at issue.

The parallel between the claim in *Brown* and the claim in *Feres* v. *United States,* 340 U.S. 135 (1950) is strong. The difference was not that the injuries were not service-connected—they both were—but rather that the status of the claimants was different.

The same is true in the case at bar. Stencel's claim is based on the Government's negligence in its dealings with Stencel. Stencel was not then, and is not now a "serviceman", nor in any comparable position. By ignoring this basic fact, the Government's brief amounts to a relitigation of the *Feres* case.

The Government cites three rationales in *Feres* that it contends are applicable here: (1) the limited liability function of the veteran's compensation scheme; (2) military discipline; and (3) the federal character of the military. A review of these factors show that they are simply not applicable to Stencel's claim in this case.

ponents which caused Stencel's injury. There is no support in the record for such an allegation. It is far more probable that the contract between the United States and Stencel along with the provision of specifications, requirements, and components were performed by civilian personnel.

The limited liability function of the veteran's compensation acts is based on a *quid pro quo* between the Government and the serviceman. The serviceman surrenders all of his other remedies against the Government for the quick, sure, and ample compensation provided in exchange by the Government. Stencel is in no way involved in this *quid pro quo.* Since Stencel receives no consideration, it should not be compelled to surrender its legal rights. Simply put, the integrity of the veterans compensation scheme is circumvented at the moment when Stencel is sued by the serviceman.

What makes the Government's position ironic is that, if Stencel's claim is barred, the Government, despite its negligence, may be able to recover its medical payments to, and cost of treatment of, Donham from Stencel by virtue of a lien against Donham's recovery.[2] The unfairness of the Government's position becomes clear when it is realized that the Government, in a reverse situation, could sue Stencel in indemnity for damages the Government sustained as a result of Stencel's primary negligence.[3]

Thus, not only is the limited liability function of the veteran's compensation laws simply not available to Stencel, but the Government could recover its payments to Donham if the positions were reversed. Therefore, as be-

[2] Such a result was refused by this Court in *United States* v. *Standard Oil Co.,* 332 U.S. 366 (1947). However, subsequently Congress established just such a right by statute. See, 42 U.S.C. §2651.

[3] See *United States* v. *Yellow Cab Co.,* 340 U.S. 543 at 551, 552 (1951).

tween Stencel and the United States, there is no *quid pro quo* on which to base an argument for the integrity of the veteran's compensation scheme. Rather, the fact that the Government could sue in indemnity were they in Stencel's position argues strongly for allowing reciprocal rights in Stencel. If the serviceman can sue Stencel thereby disrupting the compensation scheme's *quid pro quo,* it is difficult to understand why Stencel should not be permitted to recover its damages when the cause giving rise to the damages is the Government's negligence.

The military discipline rationale is not applicable to the relationship between Stencel and the United States. However, the Government seeks to conjure up the spectre tha' every injured serviceman will sue the manufacturer of the nearest piece of equipment and thereby recover from the Government. The spectre must necessarily include the notion that the manufacturer will succeed on its indemnity claim on some basis related to military discipline, such as a field commander's negligent order. The Government asks us to believe that, if such suits are allowed, field commanders will be chilled by the knowledge that servicemen may seek damages from the Government later if they are injured because of the . ction of the field commander.

In fact, all of this is an illusion rather than a spectre. If the serviceman was injured as a result of negligent orders, he will not be able to recover from the manufacturer since those orders would be a complete defense to the serviceman's cause of action. Surely the Government is not contending that the Government: (1) should be allowed to create defective conditions in products with impunity; and (2) shift liability for such defective conditions to another. The provision of specifications, requirements and components, involved in this case, is not the sort of

conduct involving the judgments of military commanders for which the Government seeks or merits protection.

This Court seems to construe the military discipline rationale as a fear that a serviceman would confront his superiors in court and challenge their decisions in an adversarial proceeding, thereby detrimentally affecting military discipline. Such a rationale has no applicability to this case because decisions, involving government specification, requirements and components are not those kind of judgments. On the contrary, decisions involving the procurement and design of equipment for the serviceman's safety and survival should, of necessity, be studied, carefully considered judgments. To the extent that allowing Stencel to recover here deters careless and negligent decisions in this area, Stencel is at a loss to see how this is either wrong or disruptive of military discipline.

In arguing that the federal character of the military should apply to the indemnity claim of Stencel, the United States seems to suggest that, since the military is unique, all causes of action touching the military should be treated uniquely. This argument goes too far for, ultimately, it means that any case which might affect the various military functions by involving military men in litigation must for that reason be dismissed.

As the United States concedes, involvement of the military in civil suits *cannot* be prevented even if they are shielded from being named parties.

Yet, the United States argues that even this ineffective shielding of the military from civil litigation is enough to justify the dismissal of Stencel's claim. This Court has never seriously considered such a step. The *Brown* and *Brooks* decisions clearly show that, once the status of the claimant is established as other than a serviceman acting

as a serviceman, this Court has not deemed it relevant to consider any effect such suits would have on the military through involvement in civil litigation.

The Government's argument at length is reduced to the following: if a claim is brought, that if brought by a serviceman would be barred, it too must be barred. This is clearly wrong since many claims are routinely brought based on conduct by the Government that if brought by a soldier would be barred. The Government's argument transcends *Feres* and asks this Court to bar all claims having anything to do with the armed forces. However, the exceptions to the FTCA reveal that Congress certainly had no such intent for it lists specifically that "combatant activities" are excluded, thereby intending liability of the armed forces in other situations.

The Government has been evaluating the claim Donham *cannot* bring, rather than evaluating Stencel's claim in order to determine whether there is congressional intent to exclude the claim. There is no evidence whatever that Congress ever intended that a private corporation could not recover damages occasioned by the negligence of the United States in its dealings with the corporation, merely because the damages include injuries to a serviceman. Nor does the Government purport to have found such evidence. Because of this the Government's argument must fail for it concedes on the first page of its Argument that this is the burden it must meet.

CONCLUSION

The judgment of the court below should be reversed and the cause remanded with instructions to deny the motion of the United States to dismiss the cross-claim of petitioner for indemnity against the United States.

Respectfully submitted,

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March 9, 1977

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 9th day of March 1977, served three copies of the foregoing Reply Brief of Petitioner upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
9th day of March, 1977

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County